STATE OF MICHIGAN

IN THE SUPREME COURT

COMPLAINT AGAINST:

Hon. Wade H. McCree
Wayne County Circuit Court
Frank Murphy Hall of Justice
1421 St. Antoine, Room 202
Detroit, MI 48226

S. Ct. No.: 146826

Formal Complaint No. 93

JUDICIAL TENURE COMMISSION
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RESPONDENT HON. WADE H. McCREE'S PETITION TO REJECT AND/OR MODIFY THE JUDICIAL TENTURE COMMISSION'S RECOMMENDATION

***** ORAL ARGUMENT REQUESTED *****

Respondent, the Honorable Wade H. McCree, through his attorneys, Collins Einhorn Farrell P.C., petitions this Court under MCR 9.224 to reject and/or modify the recommendation of the Judicial Tenure Commission as authorized under MCR 9.225, and, in support of his petition, states:

1. The misconduct at issue in this case is Judge McCree's failure to timely recuse himself in *People v King*, a matter in which his then-mistress, Geniene Mott, was a complaining witness.

2. The JTC has recommended an unprecedented, draconian punishment—removal and a 6-year "conditional" suspension.[1]

3. The JTC's recommendation should be rejected because:

   a. It is based on several erroneous, inaccurate, and improper findings, and

   b. Discipline must be "reasonably equivalent to the action that has been taken in previously equivalent cases," MCR 9.220(B)(2); see *In re Brown*, 461 Mich 1291; 625 NW2d 744 (2000), yet the JTC made no effort to compare Judge McCree's misconduct to analogous cases, which have imposed, at most, a 1 year suspension.

4. The JTC found that Judge McCree "lied about [his affair with Mott] to the Commission and to the Master."[2]

5. This Court should reject that finding because:

   a. The JTC twists words—specifically, the phrase "dawn on" and the word "oversight"—and ignores context in order to contrive a "lie."

   b. Judge McCree has consistently admitted that he should have recused himself in *King* much earlier than he did. He testified: "I should have recused myself from that case and transferred it to another judge in a more timely manner. * * * It's what I should have done, and I didn't do it. And I've never hidden behind that."[3]

   c. The JTC's conclusion that he "lied" about his relationship with Mott cannot be reconciled with the record and must be rejected.

6. The JTC concluded that Judge McCree's communications with Mott about *People v Tillman* constituted judicial misconduct.[4]

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[1] Decision and Recommendation of the Judicial Tenure Commission ("JTC Rec.") at 6

[2] JTC Rec. at 12, 13.

[3] TR II at 406, 430.

[4] JTC Rec. at 11.

7. This Court should reject that finding because:

   a. The sum total of Judge McCree's communication with Mott about *Tillman* was: (1) "Defendant should B released from Dickerson" and (2) "Just his receipt taken 2 the jail."[5]

   b. Judge McCree could have given the same "instruction" to an elderly woman who was confused about how to post bail for her grandson. Those communications were not misconduct and do not warrant discipline.

8. The JTC found that Judge McCree's "failure to immediately recuse himself from *People v Tillman* upon learning that Tillman was Mott's relative constituted judicial misconduct."[6]

9. This Court should reject that finding because:

   a. Judge McCree's clerk confirmed that she prepared the order in the usual course and Judge McCree did not give her any special instructions or involve himself in the process;[7] and

   b. Judge McCree was not required to recuse himself because a defendant, who he had never met before, turned out to be the uncle or cousin of his former mistress. See *Adair v State*, 474 Mich 1027; 709 NW2d 567 (2006).

10. The JTC found that Judge McCree committed misconduct because "[h]e falsely told the investigators that he immediately recused himself from the case once he realized the conflict."[8]

11. This Court should reject that finding because:

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[5] JTC Rec. at 11.

[6] JTC Rec. at 11.

[7] Transcript of Proceedings, Volume II ("TR II") at 362-363.

[8] JTC Rec. at 13.

a. Whether Judge McCree told the investigators that he "immediately" recused himself once he realized the conflict is irrelevant and at odds with the weight of testimony confirming that he was completely candid about the details of his affair with Mott

b. The same investigators confirmed that Judge McCree was truthful in telling them:

i. that he had an affair with Mott,[9]

ii. when the affair started,[10]

iii. that he first met Mott "when she was in his courtroom,"[11]

iv. that she "was a complaining witness in a case before him,"[12] and

v. the reason he gave when he recused himself – their sons were friends, which was true.[13]

c. The testimony that the JTC relied on for its finding does not provide a basis for a finding of misconduct or any discipline.

12. Under the label "Other Misconduct," the JTC found misconduct based on a phone call that Judge McCree made to another judge's court reporter and his filing of a divorce complaint.

13. This Court should reject that finding because:

a. "It is a fundamental rule of due process that a person must have notice of the charges against him." *In re Freid*, 388 Mich 711, 715; 202 NW2d 692 (1972); see also *In re Ruffalo*, 390 US 544, 550; 88 S Ct 1222; 20 L Ed2d 117 (1968); *Matter of Probert*, 411 Mich 210, 231 n.13; 308 NW2d

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[9] TR I at 179, 194.

[10] TR I at 178, 193-194

[11] TR I at 179.

[12] TR I at 101.

[13] TR I at 180; see also TR I at 67-68 (Mott's testimony that her son and Judge McCree's son went to a football game, go-cart racing, and had lunch together, among other things); TR II at 508 (Judge McCree's testimony, explaining that "when things were good, her son and my son were buds").

773 (1981) (holding that judicial discipline matters are subject to "the safeguards of procedural due process").

b. Neither the phone call nor the act of filing the divorce complaint was alleged as a basis for finding misconduct.

c. It follows that neither allegation can be considered as a basis for discipline.

14. This Court has **never** imposed removal and a suspension.

15. It also has **never** imposed a suspension that started at any time other than the date of its decision.

16. The JTC's unprecedented recommendation raises serious constitutional concerns.

17. Michigan law affords the voters the right to chose who will hold judicial office. Const 1963, art 2, § 1; *id.* at art 6, §§ 2, 8, 12, 16, 26; see also MCL 168.467 *et seq.*

18. The right of the electorate is subject to this Court's express authority to remove a judge. Const 1963, art 6, § 30.

19. But the JTC would go a step further and have this Court, through a "conditional" 6-year suspension, completely negate the electorate's right to re-elect Judge McCree.

20. When this Court has imposed a conditional suspension in the past, it determined the appropriate length of the suspension and ordered that it ran from the date of its decision and into the respondent judge's next term, if he was re-elected. See *In re Probert*, 411 Mich 210; 308 NW2d 773 (1981); *Matter of Bennett*, 403 Mich 178; 267 NW2d 914 (1978); *Matter of Del Rio*, 400 Mich 665; 256 NW2d 727 (1977); *Matter of*

Mikesell, 396 Mich 517; 243 NW2d 86 (1976). This Court has never ordered a suspension that "sprung up" at some later date or entirely wiped out a future term of office.

21. The JTC has given no reason for interpreting the Constitution to permit this Court to disenfranchise the electorate when neither the legislative branch nor the executive branch could effect such a result. See Const 1963, art 11, § 7; *id.* at art 6, § 25.

22. In addition, this Court has held that "[t]he most fundamental premise of the rule of law is that equivalent misconduct should be treated equivalently." *Id.* at 1292.

23. This Court has charged that JTC with "ensur[ing] that the action it is recommending in individual cases is **reasonably proportionate to the conduct** of the respondent, and **reasonably equivalent to the action that has been taken previously in equivalent cases.**" MCR 9.220(B)(2) (emphasis added).

24. Yet the JTC's analysis is void of comparison to any other cases. The unprecedented level of discipline that it recommends was seemingly plucked from the air, untethered to anything that has preceded it.

25. Had the JTC considered similar cases, it would have been unable to justify a discipline that has **never been ordered before**—removal and a 6-year conditional suspension—because the analogous cases impose, at most, a 1 year suspension.

26. For example, this Court ordered:

a. A public censure when a judge dated a criminal defendant in a case before him. *In re Templin*, 432 Mich 1220; 346 NW2d 663 (1989).

b. A public censure when a judge actually intervened in a case that wasn't assigned to him in order to benefit a county commissioner

charged with aggravated domestic assault. *In re Logan*, 486 Mich 1050; 783 NW2d 705 (2010).

c. A one year suspension (with credit for six months of a paid interim suspension) when a judge failed to recuse herself while she was having an affair with an attorney who she appointed to represent 56 criminal defendants. *In re Chrzanowski*, 465 Mich 468; 636 NW2d 758 (2001).

27. Ultimately, Judge McCree only asks that this Court stay consistent.

WHEREFORE, Judge McCree respectfully requests that this Court enter an order censuring him and suspending him for the duration of his interim suspension.

Respectfully submitted,

COLLINS EINHORN FARRELL P.C.

By: _____

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Dated: October 7, 2013

Verification

I, Hon. Wade H. McCree, hereby certify that the information contained in this Petition to Reject and/or Modify the Judicial Tenure Commission's Recommendation is correct to the best of my information, knowledge and belief.

_____
Hon. Wade H. McCree

JAMES M. STRUGS
Notary Public, State of Michigan
County of Oakland
My Commission Expires Aug. 31, 2015
Acting in the County of _____

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BRIEF IN SUPPORT OF RESPONDENT HON. WADE H. McCREE'S PETITION TO REJECT AND/OR MODIFY THE JUDICIAL TENTURE COMMISSION'S RECOMMENDATION

***** ORAL ARGUMENT REQUESTED *****

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ORDER APPEALED FROM AND JURISDICTIONAL STATEMENT

On September 10, 2013, the Judicial Tenure Commission issued its Decision and Recommendation under MCR 9.220. That same day, the JTC served respondent Hon. Wade H. McCree as required under MCR 9.223. Respondent's Petition and supporting brief are being filed within 28 days of being served. MCR 9.224(A). This Court has jurisdiction to accept, reject or modify the JTC's recommendation. MCR 9.225.

STATEMENT OF QUESTIONS PRESENTED

I.

Judge McCree admits that he had an affair with a complaining witness in *People v King* and failed to timely recuse himself. But the JTC, attempting to justify a predetermined result, has manufactured additional instances of "misconduct." It takes phrases out of context to contrive a lie. It relies on a case (*People v Tillman*) where recusal wasn't warranted and Judge McCree didn't give favoritism. It relies on immaterial testimony and, worst of all, uncharged allegations of misconduct. Should this Court reject each manufactured finding of misconduct?

Respondent Judge Wade H. McCree answers, "yes."

The Judicial Tenure Commission answers, "no."

II.

Under *In re Brown*, equivalent misconduct must be treated equivalently. Judge McCree acknowledges his misconduct in failing to timely recuse himself in *King* and that discipline is warranted. The *Brown* factors place Judge McCree's misconduct in the middle of its sliding scale. Analogous judicial discipline decisions have resulted in public censure or suspension not exceeding 1 year. Judge McCree has been suspended nearly 8 months without pay to-date. Should this Court impose an unprecedented, draconian punishment of removal with a 6-year "conditional" suspension?

Respondent Judge Wade H. McCree answers, "no."

The Judicial Tenure Commission answers, "yes."

Introduction

Once the human-interest provoking overtones of sex and an extra-marital affair are peeled away, the misconduct at issue in this case is Judge Wade H. McCree's failure to timely recuse himself. Judge McCree agrees that discipline is warranted. Similar misconduct generally leads to a public reprimand or a short suspension, e.g., 45 days. Judge McCree has been suspended, without pay, for over 238 days to-date.

The JTC has recommended an unprecedented, draconian punishment—removal and a 6-year "conditional" suspension. Judge McCree will not and has not minimized his misconduct. Discipline is warranted. But equivalent misconduct must be treated equivalently.

This Court has **never** imposed removal and a suspension. It also has **never** imposed a suspension that started at any time other than the date of its decision. But this Court has ordered:

- A public censure when a judge dated a criminal defendant in a case before him.
- A public censure when a judge actually intervened in a case that wasn't assigned to him in order to benefit a county commissioner charged with aggravated domestic assault.
- A one year suspension (with six months credit for a paid interim suspension) when a judge failed to recuse herself while she was having an affair with an attorney who she appointed to represent 56 criminal defendants.

Judge McCree only asks that this Court stay consistent. Accordingly, this Court should enter an order censuring Judge McCree and suspending him for the duration of his interim suspension.

Statement of Facts

A. Judge McCree ended an extra-marital affair in October 2012, which provoked his ex-mistress.

On November 1, 2012, after 9 p.m. in the evening, Geniene Mott began pounding on the front door to the McCrees' home.[1] Judge McCree's family was home and his wife, Laverne McCree, testified that she was so concerned for her family's safety that she told her children to go to the basement and to take a cell phone to communicate with her.[2]

Mott continued pounding on the McCrees' door for 20 minutes while making multiple calls to Judge McCree's cell phone or home phone.[3] After calling the police, Judge McCree eventually confronted Mott and got into her car so that she would leave because he too was concerned for his family.[4]

This door pounding incident stemmed from Judge McCree informing Mott that he was ending their extra-marital affair.[5] Judge McCree's wife had discovered the affair as it was coming to an end on October 31, 2012.[6] She had returned home from grocery shopping when the phone rang.[7] Judge McCree answered it, but Laverne McCree later

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[1] Transcript of Proceedings, Volume II ("TR II") at 259-260.

[2] TR II at 259-260, 265.

[3] TR II at 261-262.

[4] See TR II at 264-265; see also Transcript of Proceedings, Volume I ("TR I") at 201.

[5] TR II at 255-256, 470-473.

[6] TR II at 254.

[7] TR II at 254.

started listening in on another phone.[8] She heard a woman's voice that she didn't recognize saying, "What do you mean it's over? We're not through. What do you mean we're breaking up?" and her husband saying, "Yes, we are through. We're done. We're breaking up."[9] At that point, Laverne, while staying on the line, confronted her husband, who had taken the call to his truck in their garage.[10] When Laverne tapped on the windshield and held up the phone, Judge McCree hung up and confessed: "Yes, I was having an affair. I'm breaking it off. I don't want to be with this woman anymore."[11]

B. Judge McCree's affair with Mott began after he accepted a delayed sentence agreement in a felony nonsupport case in which Mott was the complaining witness.

Judge McCree met Mott for the first time after the May 21, 2012, plea hearing in *People v King*.[12] Judge McCree presided over *King*, a felony nonsupport case, and accepted the defendant's guilty plea subject to a delayed sentence agreement before he began the affair with Mott.[13]

Judge McCree noticed Mott (the mother of King's son) when she was talking to his courtroom deputy after the hearing.[14] Mott and Judge McCree exchanged contact

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[8] TR II at 255.

[9] TR II at 255-256.

[10] TR II at 256-257.

[11] TR II at 257.

[12] TR I at 56-58; TR II at 394.

[13] See, e.g., TR I pp. 131-165 (examples of Mott's evasive responses to questions).

[14] TR II at 394.

information through his deputy.[15] A few days later they met for lunch and began an extra-marital affair.[16]

C. Judge McCree failed to timely recuse himself in *People v King*.

The *King* case was set for a "status date" on August 16, 2012. Status dates are used to determine whether a defendant is complying with the delayed sentence agreement and to intervene before he falls too far behind on his child support payments so that he can become current.[17] Often, there is no actual hearing because the defendant is not required to appear if he is in compliance.[18] As a result, Judge McCree typically does not know whether the status dates on his docket will result in a hearing or any action until the scheduled day.[19]

Judge McCree was aware that Mott was a complaining witness in *King*. He was also aware that he should recuse himself from *King*. But, he didn't timely recuse himself because, as he explained, the *King* case "was nothing that was on the front of my mind":

> Q. But was it a matter that you thought about?
>
> A. **Yes.** I suppose it mattered that I thought about it. **I mean, it was something that I should have done, but it was nothing that was on the front of my mind.** And I wasn't keeping the case for any illicit purpose or to help out or hurt anyone.[20]

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[15] TR II at 395, 397, 533-534.

[16] TR II at 396-398.

[17] TR II at 392.

[18] TR II at 374, 393.

[19] TR II at 393.

[20] TR II at 412 (emphasis added).

The first time that Judge McCree and Mott specifically spoke about the *King* case after they met was August 12, the Sunday before King's August 16 status date.[21] They exchanged a series of texts the evening of August 12 concerning Mott's claim that King was behind on his payments.[22]

Mott's text messages show that she had an inflated sense of her input on the *King* case. She wrote that she would text Judge McCree "what I want done" and demanded that Judge McCree order King to jail "until he pays 2500 cash directly 2 me ..."[23] But Judge McCree refused to treat King differently from any other defendant on a delayed sentence in a felony nonsupport case. Judge McCree explained the options available if, in fact, King was behind on his payments: "[I]f he hasn't come current by his court date, he gets jail to pay. If he says he can bring me the $$, I'll put him on a tether till he brings the receipt 2 FOC or do 'double time.'"[24] While Mott wanted King to pay more than he was ordered, Judge McCree explained that he "can't order 2 pay more than the probation order would have required over the same period" and that "the math will be based on his failures since being placed on probation ..."[25]

In the days leading up to the August 16 hearing, Judge McCree focused on the docket in front of him instead of a case that may never come up for hearing:

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[21] TR II at 548.

[22] Decision and Recommendation of the Judicial Tenure Commission ("JTC Rec.") at 6. The text messages are quoted as written, including typographical errors and shorthand.

[23] JTC Rec. at 6.

[24] JTC Rec. at 6.

[25] JTC Rec. at 6.

> This is Sunday night. And Monday, I get to work, and here are my 40 to 60 cases that are in my lap Monday morning and it's a new day. And I'm—I'm working the docket. Again, as I said earlier, King may not even have come in front of me.
>
> And it was an absolute bonehead oversight, and I've admitted that from the very beginning. It's what I should have done, and I didn't do it. And I've never hidden behind that.[26]

But *King* did come up for hearing on August 16. Judge McCree exchanged text messages with Mott that morning. Judge McCree directed Mott, who was still referring to "our deal," to Sharon Grier, the assistant prosecuting attorney for *King*. In an effort to appease Mott, Judge McCree told Mott that Grier had "been 'prepped.'" But, as APA Grier confirmed, Judge McCree had not discussed the merits or any planned disposition with Grier ahead of the hearing.[27]

King was behind on his child support payments, so the August 16 hearing went on the record. The prosecutor recommended that Judge McCree revoke King's delayed sentence.[28] But Judge McCree placed King on a tether instead, giving him a chance to meet his payment obligations under the delayed sentence agreement.[29] APA Grier confirmed that this was not out of the ordinary and, in fact, it is done "all the time."[30]

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[26] TR II at 430.

[27] TR I at 223-224; TR II at 436-437.

[28] TR I at 232.

[29] TR I at 233.

[30] TR I at 233.

Judge McCree has been forthright in admitting that his failure to recuse himself in *King* on August 16 was wrong:

> Q. Why couldn't you recuse yourself then [i.e., at the August 16 hearing]?
>
> A. An absolute blunder. I wish there was -- I wish there was a more polite answer to say. I should have. I could have done it right then and there. When this case was called, I could say, Stop. I can't hear this. I should have, and I didn't.[31]

On September 18, 2012, Judge McCree did what he admits that he should have done much earlier—he recused himself in *King*. Judge McCree told Presiding Judge Timothy M. Kenny that he had to disqualify himself in *King* because his son was friends with Mott's son. That statement is true.[32] The case was then reassigned to Judge James A. Callahan. And Judge Callahan confirmed that Judge Kenny decided who the *King* case was to be reassigned to.[33] While Judge McCree had asked Judge Callahan whether he would mind accepting the case, Judge Callahan confirmed that Judge McCree did not have to seek his permission because it was Judge Kenny's decision to make.[34]

D. Judge McCree has been suffering from hypomania, a condition for which he has received treatment that will allow him to return to being the well-regarded jurist that the people elected.

Judge McCree has always had an effervescent personality. But his affair with Mott and related behavior was out of character for him.

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[31] TR II at 438.

[32] TR I at 222 (testimony of APA Grier); TR I at 67-68; TR II at 508; Master's Report per Rule 9.214 ("Master's Report") at 4.

[33] TR I at 43 (emphasis added).

[34] TR I at 43-44.

Judge McCree is well regarded in the legal community. As the chief of the criminal investigations division of the Wayne County Prosecutor's office testified, "He treats people fairly, with respect."[35] As APA Grier confirmed, Judge McCree has a "very busy docket" that he handles in an efficient manner.[36] APA Grier also testified that he is never disrespectful.[37] In fact, "basically everyone loves Judge McCree."[38] He is courteous, gives everyone an opportunity to speak despite the pressures of his heavy docket, and "he rules based on what he believes ... is fair and just."[39]

Dr. Jacobi, an internal medicine physician who has treated Judge McCree over the past 10 years, testified that Judge McCree has always been "very smart but also very fast talking, lively, jovial."[40] Dr. Jacobi became concerned that Judge McCree's lively personality had crossed into a condition requiring treatment when he heard an interview with Judge McCree in April 2012.[41] During the interview, Judge McCree made the ill-fated "no shame in my game" quip that garnered public attention. It "was a strikingly abnormal thing for Wade," which, based on his years of knowing Judge

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[35] TR I at 241; see also TR II at 444 (testimony of Wayne Circuit Court Judge Boykin that Judge McCree "treated everyone with respect. And I mean everyone, witnesses, litigants").

[36] TR I at 226.

[37] TR I at 227.

[38] TR I at 227.

[39] TR I at 227.

[40] Transcript of Proceedings, Volume III ("TR III") at 580.

[41] TR III at 584-585.

McCree, "suggested ... a loss of the normal control that people who are judges normally have."[42]

Dr. Jacobi became concerned that Judge McCree's behavior had crossed over into hypomania. He described hypomania and how it affects an individual:

> People feel excessively jovial, exuberant, impulsive, overly confident. Their speech becomes abnormally fast. They almost have an inflated sense of self-esteem. Mania is—you know, people become grandiose. They're hyperenergetic, hyper.
>
> .... It can shade into people being reckless. They become—you know, they lose that ability to exercise prudence and carefulness.
>
> Hypomania is mania, but to a lesser extent. So mania is usually obvious. Mania is people become grandiose. They only need three or four hours of sleep at night. They're hyperenergetic. Hypomania is not nearly as obvious or severe, but people can still lose that ability to manage themselves prudently and cautiously. By definition, hypomania mans that the person is impaired in some way.[43]

Dr. Jacobi further explained that, if left untreated, hypomania would lead to the out of character lack of control that Judge McCree exhibited:

> [T]his was a striking maladroit response to the media that made me think I wonder if Wade has sort of lost that capacity to manage his public persona well....
>
> And once you start - once your mood starts becoming so hyper and sort of once you lose that ability to manage your public persona, now it's causing him a functional

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[42] TR III at 585.

[43] TR III 579-580.

> impairment and now he's –okay. Now it rises to the level of something that a psychiatrist would want to focus on.[44]

When asked whether hypomania was treatable, Dr. Jacobi confirmed that it was "very much so."[45]

After seeing the news report, Dr. Jacobi contacted Judge McCree with his concerns and told him to see a psychiatrist, emphasizing "that this is something treatable. This is something, you know, fixable."[46] Dr. Jacobi later examined Judge McCree and, in his neurological exam, observed that Judge McCree was "very buoyant," and that "Wade had sort of lost that internal censor to some extent and was, you know, not acting in the way that I remember Wade, not that politically astute kind of guy."[47]

Dr. Longs, a psychiatrist and long time friend of Judge McCree, conducted an initial clinical assessment of Judge McCree. Dr. Longs diagnosed "an adjustment disorder with depressed mood and anxiety" and "suggested bipolar disorder not otherwise specified."[48] Dr. Longs explained that his "initial conclusion was that [Judge McCree] was going through an adjustment with – which included anxiety, depression, insomnia, and even some vegetative signs and symptoms related to anxiety."[49] Due to

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[44] TR III at 586.

[45] TR III at 582.

[46] TR III at 587.

[47] TR III at 588, 590; see also Respondent's Exhibit MM(2); Transcript of Separate Records of Proceedings at 608.

[48] TR III at 662.

[49] TR III at 666.

their friendship, Dr. Longs referred Judge McCree to another psychiatrist. But he also prescribed Lamictal, a mood stabilizer that is used "when a person is presenting with what could appear to be some hypomanic signs and symptoms or anxiety, agitation, irritability."[50]

Judge McCree is still receiving treatment with a psychiatrist.[51] He has been medically cleared to return to work.[52]

E. Post-Affair

The sexual aspect of Judge McCree's affair with Mott ended in October 2012 before his wife learned of the affair.[53] But extricating Mott from his life wasn't as easy as telling her that the affair was over. Mott claimed to be pregnant with Judge McCree's child and continued to pursue him. Because he became concerned for his family's safety, Judge McCree reported her conduct to the Wayne County Prosecutor's office and disclosed his affair with Mott in the process.

1. Mott continued to harass Judge McCree and his family after their affair ended.

Mott's threatening behavior didn't end the evening of November 1 when she pounded on the McCree's front door. She repeatedly threatened to make her affair with Judge McCree public if he did not give her what she wanted, which included money.[54]

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[50] TR III at 669-671.

[51] TR II at 518.

[52] *Id.*

[53] TR II at 398.

[54] TR I at 263 (Laverne McCree's testimony that Mott left a voicemail threatening that "if you don't open the door, I will contact the media"); TR II at 507-508; see also TR I at 205 (testimony of Detective Matouk).

Laverne McCree confirmed that when Mott was outside their home on November 1, Mott left a voicemail threatening to "contact the media" if they didn't let her in.[55]

Mott denied that she demanded money from Judge McCree. But her testimony is not credible on that point. Judge McCree testified that Mott demanded $10,000 on November 18, 2012, when she confronted him during his routine Sunday run at Belle Isle.[56] Mott denied that she confronted Judge McCree that day.[57] Yet she sent a text that same day that referred to seeing Judge McCree in his running tights that morning.[58] Two days later, Mott sent a text asking whether Judge McCree "got what [he] need[ed] from Dave."[59] Dave was "a credit union person from whom [McCree] got a loan for $5,000 to help Mott" in the past.[60] Mott's impeached denial of confronting Judge McCree on November 18 and her reference to Dave confirms Judge McCree's testimony that she was demanding money from him.

Mott's harassing behavior did not end with confronting Judge McCree at Belle Isle.[61] Just days later, on the Wednesday morning before Thanksgiving, Laverne

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[55] TR I at 263.

[56] TR II at 491-492.

[57] TR I at 148 (testifying that she "never had a discussion at Belle Isle with Wade McCree at any time in our relationship").

[58] TR I at 148; Respondent's Exhibit V (text message from Mott to Judge McCree, stating "The more I replay what u told me this morning the more I gotta laugh that's funnier than seeing u in those tights lol"); see also TR II 281 (Laverne McCree's testimony that Judge McCree typically wears black running tights when he goes jogging).

[59] TR I at 164; Respondent's Exhibit V (text message dated November 20, at 7:45 a.m.).

[60] Master's Report at 7.

[61] TR II at 489-490; TR II at 255-256 (Laverne McCree's testimony about overhearing a phone call in which Judge McCree told Mott that he was ending their affair); TR II at

McCree saw Mott drive by the McCrees' home.[62] Later that day, Laverne saw Mott's vehicle driving in their neighborhood.[63] Mott also continued to make numerous, repeated calls to Judge McCree's cell phone, which a detective in the Wayne County Prosecutor's office, Timothy Matouk, observed while discussing the matter with Judge McCree.[64]

2. *People v Tillman.*

Though the affair was over and Mott was demanding money from him, she continued to contact Judge McCree about various matters. One such matter was *People v Damone Tillman*, a felony nonsupport case. Damone Tillman is apparently Mott's uncle or cousin (even Mott isn't sure which it is).[65]

When Judge McCree was out on sick leave, Judge Kevin F. Robbins ordered a $500 bond in *Tillman*. Judge McCree's court clerk, Dar'Lynn Covington, explained that when a bond is set in a felony nonsupport case, it can be paid to the Friend of the Court

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470-473 (Judge McCree explaining that he ended the affair at the end of October); see also TR I at 194, 201-202 (Matouk testimony).

[62] TR I at 266.

[63] TR I at 269-270; see also TR II at 497 (testimony that Mott lives in northwest Detroit, while Judge McCree lives in southeast Detroit).

[64] TR I at 197, 205 (Matouk testifying that when he met with Judge McCree, the judge's cell phone received multiple calls from Mott); Examiner's Exhibit 7, Report of Detective Matouk ("While we were talking to Judge McCree his phone was constantly buzzing with messages from Mott."); TR II at 506 (McCree testimony).

[65] TR I at 101-102 (quoting text message from Mott referring to Tillman as her uncle); TR I at 98 (testifying that Tillman is her cousin).

before 4 p.m.[66] If it's paid before 4 p.m., the defendant will be released.[67] But, if it is not paid in time, the defendant is sent to the jail and the payment must be made to the jail.[68]

Covington explained that processing a payment through the jail can take up to a week.[69] The process involves the money being sent to the bond office, which then notifies the Court that it needs an order directing where the money should be sent before the defendant is released.[70] That is what occurred in *Tillman*:

> A. When we have cases, when the prosecutor asks for a bond, if the judge sets it, that's the bond amount. And in this case it was $500. If the bond is not paid at Friend of the Court by 4:00, you can go to the jail and pay it. The jail forwards the money over to the bond office. The bond office cannot do anything with the money unless they have a signed order from the judge directing that money to the Friend of the Court.
>
> * * *
>
> Q. Why is it that Judge McCree signed an order that was issued by Judge Robbins?
>
> A. The Damone Tillman case was during the time Judge was off, and normally it takes a while for the money to come from the jail over to the bond office. And once it's at the bond office, they'll call up and tell us they need an order. And this—evidently, this was the date that they called, and they—[71]

Importantly, Judge McCree **did not have any role in having the order prepared**:

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[66] TR II at 365.

[67] *Id.*

[68] *Id.*

[69] TR II at 365.

[70] TR II at 362-363.

[71] TR II at 362-363.

Q. Did Judge McCree ask you to prepare this order?

A. No. I prepare it, and then I'll tell him. I'll let him know what's—

Q. Prior to preparing this order, though, did Judge McCree give you any sort of direction as to an order that was needed in the Tillman case?

A. No.[72]

By November 13, 2012, when Judge McCree signed the order in *Tillman*, his affair with Mott had come to an end.[73] Judge McCree had never met Tillman. He did not know that Tillman had any relationship with Mott before that day.[74] Mott was not a party to the *Tillman* case nor was she a witness. While there may be no dispute that Judge McCree sent Mott text messages saying "Defendant should B released from Dickerson" and "Just his receipt taken 2 the jail," there also is no dispute (since the JTC never even tried to produce contrary evidence) that Judge McCree did not involve himself in preparing an order.[75]

3. After weeks of harassment, Judge McCree, fearing for his family's safety, reported Mott's conduct (and disclosed his affair) to the Wayne County Prosecutor's office.

On November 20, 2012, Judge McCree reported to the Wayne County Prosecutor's office that he believed that Mott was stalking[76] and extorting[77] him.[78] When

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[72] TR II at 363.

[73] TR II at 255-256; TR II 470-473.

[74] TR II at 450-451.

[75] JTC Rec. at 11.

[76] *Nastal v Henderson & Assocs Investigations, Inc*, 471 Mich 712, 722 (2005) ("[S]talking constitutes a willful course of conduct whereby the victim of repeated or continuous

a prosecutor and an investigator interviewed him, Judge McCree disclosed that he had an extra-marital affair with Mott.[79] He admitted that "they had first met when she was in his courtroom" and that she was "a complainant on a case, a nonsupport case."[80] He accurately told them that he recused himself in that case and that the reason he gave for his recusal was the friendship between his and Mott's sons.[81] He explained that Mott was claiming that she was pregnant with his child and had begun harassing him and his family.[82] He also informed them that Mott had demanded $10,000 to keep her from

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harassment actually is, and a reasonable person would be, caused to feel terrorized, frightened, intimidated, threatened, harassed, or molested."); MCL 750.411h(1)(d). Examples of stalking include: "[f]ollowing or appearing within the sight of that individual," "[a]pproaching or confronting that individual in a public place," "[a]ppearing at that individual's workplace or residence," "[c]ontacting that individual by telephone," and "[s]ending ... electronic communications to that individual." MCL 750.411h(1)(e).

[77] Extortion is defined as a malicious threat of "any injury to the person or property or mother, father, husband, wife or child of another with intent thereby to extort money or any pecuniary advantage whatever." MCL 750.213.

[78] TR I at 33-34; TR I at 177.

[79] TR I at 179 (testimony of Robert Donaldson answering in the affirmative when asked whether Judge McCree "inform[ed] you that he had an affair with a woman for the previous six months" and whether he "indicate[d] to you that this affair included sexual activity"); TR I at 194 (testimony of Timothy Matouk that Judge McCree admitted that "Ms. Mott was also his mistress" and that "there was sexual activity between them"); see also TR II at 509 (Judge McCree testifying that "I did confess to them that I had been in an extramarital affair with a woman"); Examiner's Exhibit 7, Report of Detective Matouk ("Judge McCree informed us he had an affair for approximately 20 weeks with Geniene LaShay Mott.").

[80] TR I at 179-180 (testimony of Robert Donaldson); TR I at 194 (testimony of Timothy Matouk that Judge McCree told him that Mott "was a complaining witness in a case before him"); Examiner's Exhibit 7, Report of Detective Matouk ("Judge McCree stated Mott was before him as a complainant on a case ....").

[81] See TR I at 180.

[82] TR I at 180.

publicizing their affair and her pregnancy and that he had ongoing communications with Mott on those matters.[83]

Detective Matouk attempted to speak with Mott about the matter.[84] But at that point, "the investigation basically ended" and, as James Bivens (chief of the criminal investigations division of the prosecutor's office) explained, Judge McCree was told that "he would have to file a formal complaint with the police department" because "[t]hat's the order of things."[85] Detective Matouk advised Judge McCree that he should seek a personal protection order against Mott.[86]

F. The JTC initiated this matter after Mott disclosed the affair to a TV news reporter.

Mott made good on her threats to expose the affair. These proceedings followed a television report based on Mott's (mainly false) version of events.

A hearing master, retired Judge Charles A. Nelson, took four days of testimony and issued a report. Judge McCree and the Examiner filed objections to the master's report. After hearing argument, the JTC issued a Decision and Recommendation, concluding that the following constituted misconduct:

- "Respondent's relationship with Mott, a litigant in a case before him";

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[83] TR I at 193 (testimony of Timothy Matouk); Examiner's Exhibit 7, Report of Detective Matouk; see also TR I at 245 (testimony of James A. Bivens, Jr., the Chief of Investigations for the Wayne County Prosecutor, that, if Mott falsely claimed she was pregnant and demanded money from Judge McCree, that would be extortion); TR I at 203.

[84] TR I at 204.

[85] TR I at 243.

[86] TR I at 204.

- "Respondent ... regularly engaged in ex parte communications with Mott regarding *People v King*";
- "Respondent's ex parte communications with Mott regarding *People v Tillman*";
- "Respondent's failure to immediately recuse himself from *People v Tillman* upon learning that Tillman was Mott's relative";
- "Respondent testified ... that at the time of his first sexual encounters with Mott on June 19-21, 2012, it did not 'dawn' on him to recuse himself from *People v King*, that the failure to recuse himself was an 'oversight,' and that he simply 'wasn't thinking about it'";
- "He falsely told the investigators that he immediately recused himself from the case once he realized the conflict";
- "Respondent called the office of Wayne Circuit Judge Susan Borman to check on a landlord-tenant matter Mott had before Judge Borman";
- "Respondent prepared and filed a divorce complaint ...even though ... he had no intention of going through with the divorce"; and
- "Respondent served the divorce papers on his wife himself in violation of MCR 2.103(A)".

Without comparing this case to similar cases to determine proportionate discipline, the JTC recommended an unprecedented punishment: "[R]emove Respondent from judicial office and conditionally suspend him from office, without pay, for a period of six years, beginning January 1, 2015, with the suspension becoming effective only if Respondent is re-elected to judicial office on the November, 2014 ballot."

I.

Judge McCree admits that he had an affair with a complaining witness in *People v King* and failed to timely recuse himself. But the JTC, attempting to justify a predetermined result, has manufactured additional instances of "misconduct." This Court should reject each manufactured finding of misconduct.

A. The JTC's finding that Judge McCree "lied" about his affair with Mott should be rejected. The JTC turns a blind-eye to the record and takes Judge McCree's use of the phrase "dawn on" and "oversight" out of context to contrive a lie.

There is no dispute that Judge McCree committed misconduct. He had an affair with a complaining witness in a case before him and failed to immediately recuse himself. He has never contended otherwise. And, more important, he has always admitted that he should have recused himself from *King* much earlier than he did. It is only through twisting words and ignoring context that the JTC was able to conclude that "Respondent engaged in a personal, intimate relationship with a litigant in a case before him and then lied about it to the Commission and to the Master."[87]

The alleged "lie" involves the use of the phrase "dawn on" and the word "oversight." This is the full context and source of the "dawn on" phrase, which was used in Judge McCree's answer to the original complaint:

> 44. Respondent failed to disqualify himself from *People* v. *King* and/or failed to have the case transferred to another judge until September 18, 2012.
>
> ANSWER: Answering paragraph 44, Judge McCree admits. Judge McCree acknowledges that he should have transferred the *King* case before the August 16, 2012 hearing. The August 16th hearing was the only hearing that Judge McCree presided over in the *King* case during the course of his relationship with Ms. Mott. Judge McCree acknowledges that it was wrong for him not to transfer the case to another judge before the August 16, 2012 hearing. Unfortunately, it did not **dawn on** Judge McCree until just prior to Mr. King actually appearing in front of him on August 16, 2012 **that a hearing involving Mr. King was actually going to take place**. Judge McCree had thought Mr. King would pay the outstanding amount owed under the delayed sentence

[87] JTC Rec. at 13.

> agreement on the eve of the court date as had been Mr. King's usual practice in the past and if Mr. King had paid the amounts he owed under the delayed sentence agreement, he would not have appeared before Judge McCree.[88]

Judge McCree was not implying that it did not "dawn on" him that recusal was warranted. He was explaining that, given his busy docket and the fact that status dates often do not result in hearings, he did not give proper attention to the matter until the hearing came up on August 16.

Judge McCree used the term "oversight" in his testimony as follows:

> Q. But Mr. King's case was still on your docket.
>
> A. You are correct.
>
> Q. Why?
>
> A. It was an absolute pure oversight. **I should have recused myself from that case and transferred it to another judge in a more timely manner.** I did not.
>
> * * *
>
> Q. Is the reason you didn't recuse yourself is because you thought he would be in compliance?
>
> A. No. I hadn't given it any thought at all, but, had he been in compliance, I wouldn't have seen him. I won't say it wouldn't have been necessary. **It would have—it should have happened. I didn't do it**, and it was an absolute oversight, but there was nothing intentional about me keeping the case at all.
>
> * * *
>
> Q. ... Why didn't you recuse yourself come Monday morning?

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[88] Answer dated March 26, 2013.

A. Exactly right. Well, quite frankly, given the volume of the docket and the fact that, like I said, not so much in one ear, out the other, in poor judgment, I did not think it was a good—it was a good thing that I not recuse myself, but it absolutely had slipped my mind.

This is Sunday night. And Monday, I get to work, and here are my 40 to 60 cases that are in my lap Monday morning and it's a new day. And I'm—I'm working the docket. Again, as I said earlier, King may not even have come in front of me.

And it was an absolute bonehead **oversight**, and **I've admitted that from the very beginning. It's what I should have done, and I didn't do it. And I've never hidden behind that.**[89]

The JTC would prefer to ignore the context of Judge McCree's testimony, but, as always, context matters. In context, Judge McCree consistently admitted that he should have recused himself in *King* much earlier than he did. He never contended that he was confused or thought recusal was not warranted; because clearly, he knew that it was.

Judge McCree's choice of words may not have been perfect. But his word choice should be taken in context, not distorted to mean more than what was intended. Judge McCree's description of an "oversight," taken in context with his admission that he failed to timely recuse himself and knew better, was neither a lie nor perjury.

This Court should not lose sight of Judge McCree's most important testimony in which he took responsibility for his misconduct: "**I should have recused myself from that case and transferred it to another judge in a more timely manner. * * * It's what I should have done, and I didn't do it. And I've never hidden behind that.**" The JTC's

[89] TR II at 406, 408, 430.

conclusion that he "lied" about his relationship with Mott cannot be reconciled with the record and must be rejected.

B. The JTC's conclusion that Judge McCree violated his ethical obligations in *People v Tillman* is wrong. Judge McCree had no obligation to recuse himself in *Tillman*. Moreover, he had no role in preparing the order and his signing was a ministerial act that was legally correct and appropriate.

The JTC concluded that Judge McCree's communications with Mott about *Tillman* "constituted judicial misconduct." The sum total of his communication with Mott was: (1) "Defendant should B released from Dickerson" and (2) "Just his receipt taken 2 the jail."[90] Judge McCree could have given the same "instruction" to anyone in the courthouse. The fact that he knew Mott does not make the communication any more improper than had he stopped to help an elderly woman who was confused about how to post bail for her grandson.

The JTC concluded that Judge McCree should have recused himself from *Tillman* because "Tillman was Mott's relative."[91] Recall that Judge McCree had never met Tillman. He did not know that Tillman had any relationship with Mott before November 13, 2012.[92] Even Mott is unclear whether Tillman is her cousin or uncle.[93] Mott was not a party to the *Tillman* case nor was she a witness. This attenuated relationship did not warrant recusal and cannot support a finding of misconduct.

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[90] JTC Rec. at 11.

[91] JTC Rec. at 11.

[92] TR II at 450-451.

[93] TR I at 1010-102 (Mott's text referring to Tillman as her uncle); TR I at 98 (Mott's testimony that Tillman is her cousin).

In *Adair v State*, 474 Mich 1027; 709 NW2d 567 (2006), the Attorney General represented a party. The opposing party moved to recuse Chief Justice Taylor and Justice Markman because their wives worked in the Attorney General's office. The Court held that Chief Justice Taylor and Justice Markman were not required to recuse themselves based on their "spouses' employment with the office of the Attorney General and the 'appearance of impropriety' assertedly raised by such employment." *Id.* at 1027. MCR 2.003 addresses when disqualification of a judge is warranted. While MCR 2.003 addresses recusal when a "judge's spouse, or a person within the third degree of relationship" is involved, none of those circumstances were present in *Adair*. Accordingly, MCR 2.003 did not require recusal. *Id.* at 1031. The Court observed that the court rule was "consistent with relevant judicial decisions on the subject of the instant motion," citing cases in which a family member's employment with a party did not warrant recusal. *Id.* at 1035, citing *Southwestern Bell Tel Co v FCC*, 153 F3d 520 (CA 8, 1998); *Datagate, Inc v Hewlett-Packard Co*, 941 F2d 864 (CA 9, 1991); *Hewlett-Packard Co v Bausch & Lomb Inc*, 882 F2d 1556 (CA Fed, 1989).

This Court also refused to interpret the "appearance of impropriety" standard in Canon 2 of the Michigan Code of Judicial Conduct to cover subject matter that is addressed in other court rules or canons. 474 Mich at 1039 ("The 'appearance of impropriety' standard is relevant **not where** there are specific court rules or canons that pertain to a subject, such as judicial disqualification ..." (emphasis added)); see *In re Haley*, 476 Mich 180, 194; 720 NW2d 246 (2006) ("We decline to create an independent 'appearance of impropriety' standard to judge respondent's behavior when there is an

express, controlling judicial canon."). Canon 2's reference to an appearance of impropriety "must be read in the context of Canon 3(C) , which states with regard to the specific question of judicial disqualification that a judge 'should raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under MCR 2.003(B).'" 474 Mich at 1038-1039 (emphasis omitted).[94] The Court, citing Chief Justice Rhenquist's response to a motion to disqualify him in a case involving his son's law firm, also held that the appearance of impropriety standard "cannot be equated with **any** person's perception of impropriety, lest a judge find himself or herself subject to a barrage of recusal motions on the part of **any** person who apprehends an impropriety, however unreasonable this apprehension." *Id.* at 1039, citing *Microsoft Corp v United States*, 530 US 1301; 121 S Ct 25; 147 L Ed 2d 1048 (2000) (Rhenquist, C.J.). The appearance of impropriety "must be assessed in light of what can be gleaned from existing court rules and canons, historical practices and expectations, and common sense." *Id.* at 1039.

None of the grounds for recusal listed in MCR 2.003 warranted Judge McCree's recusal in *Tillman*. The only potentially relevant ground is the appearance of impropriety, MCR 2.003(C)(1)(b)(ii), but that standard must be "assessed in light of what can be gleaned from existing court rules and canons, historical practices and expectations, and common sense." *Id.* at 1039.

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[94] MCR 2.003(B) was amended after *Adair* to provide that recusal is warranted when "[t]he judge, based on objective and reasonable perceptions, has ... failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct." That amendment appears to create a circular analysis.

The Court of Appeals analysis in *Pukke v Hyman Lippit, PC*, unpublished opinion per curiam of the Court of Appeals, issued June 6, 2006 (Docket No. 265477); 2006 WL 1540781 (**Exhibit 1**) is instructive. There, the plaintiff moved to disqualify the trial court judge because one of the firm's principals, J. Leonard Hyman, had represented her father's business. The trial court judge denied the motion and the Court of Appeals affirmed. In Michigan, there is "a strong presumption of judicial impartiality" and, "[a]bsent proof of actual bias or prejudice, a judge will not normally be disqualified." *Id.* at *14. The attenuated relationship that the plaintiff relied on did not warrant disqualification because it occurred years earlier and Hyman was not personally involved in the transactions that were disputed in the then-pending matter.

Judge McCree had no relationship with Tillman and, by November 13, 2012, his affair with Mott was over.[95] If disqualification is not warranted when a party employs a judge's son or wife or when a party previously represented the judge's father, then it is not warranted when a party who a judge has never met turns out to be related to a woman he used to sleep with.

Moreover, Tillman did not receive any preferential treatment (or even mistreatment) based on Mott's past relationship with Judge McCree. Judge McCree did not give his law clerk **any directions** concerning the matter.[96] Because Judge McCree was not required to recuse himself from *Tillman* and did not act improperly in processing Tillman's bond payment, the JTC's finding of misconduct should be rejected.

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[95] TR II at 255-256; TR II 470-473.

[96] TR II at 363.

C. Detective Matouk's testimony concerning when Judge McCree recused himself does not provide a basis for a finding of misconduct or any discipline.

Detective Matouk testified that Judge McCree "said that as soon as he realized that the child's father was in front of him that he immediately transferred the case to Judge Callahan."[97] But Detective Matouk also confirmed that Judge McCree admitted that he had an affair with Mott,[98] that she "was a complaining witness in a case before him,"[99] and that their affair spanned six months.[100]

Deputy Chief Donaldson interviewed Judge McCree with Detective Matouk. Deputy Chief Donaldson confirmed that Judge McCree admitted the affair,[101] that it lasted six months,[102] and that Mott was "a complainant on a case, a nonsupport case."[103] Judge McCree told them that he met Mott "when she was in his courtroom."[104]

The disconnect, if any, is in the timing of the recusal, i.e., whether Judge McCree "immediately" recused himself. According to Detective Matouk's written report, Judge McCree only said that "Mott was before him as a complainant on a case and he referred

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[97] TR I at 195.

[98] TR I at 194 (testimony of Timothy Matouk that Judge McCree admitted that "Ms. Mott was also his mistress" and that "there was sexual activity between them.

[99] TR I at 194.

[100] TR I at 194 (Matouk, referring to "a six-month period"); TR I at 193 (Matouk, "approximately 20 weeks").

[101] TR I at 179 (testimony of Robert Donaldson answering in the affirmative when asked whether Judge McCree "inform[ed] you that he had an affair with a woman for the previous six months" and whether he "indicate[d] to you that this affair included sexual activity").

[102] TR I at 178.

[103] TR I at 179-180.

[104] TR I at 179.

that case to Judge Callahan."[105] The report said nothing about the "immediacy" of the recusal. Deputy Chief Donaldson did not confirm Detective Matouk's testimony. When asked whether Judge McCree told him that "he transferred the case when he discovered that she was a complaining witness," Donaldson did not add a timing or "immediacy" element to what Judge McCree told him and Detective Matouk:

> Q. And he did tell you that he transferred the case when he discovered that she was a complaining witness on the case?
>
> A. I don't know quite how to answer that. He did indicate that he transferred the case. It was not at the inception of the conversation, somewhere in the middle. He indicated that it had been transferred to Judge Callahan, and I think he indicated that the reason for it was that one of his children had interacted with one of the complainant's, Ms. Mott's, children.[106]

In addition, whether Judge McCree accurately conveyed the timing of his recusal in relation to his affair with Mott is entirely irrelevant. The details concerning the timing of Judge McCree's recusal did not involve a crime and thus could not violate any law. See MCL 750.411a(1) (prohibiting the "false report of the commission of a crime").[107] This also was not a statement made to the JTC.

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[105] Examiner's Exhibit 7, Report of Detective Matouk.

[106] TR I at 180.

[107] In *People v Chavis*, 468 Mich 84; 658 NW2d 469 (2003), this Court held that lying about the details concerning a crime violates MCL 750.411a(1). But the timing of Judge McCree's recusal did not concern any crime. Judge McCree was reporting Mott's potential stalking and extortion. The timing of his recusal was completely immaterial and unrelated to Mott's behavior in November 2012. More important, Judge McCree truthfully disclosed the nature of his past relationship with Mott. TR I at 179, 194; see also TR II at 509.

Detective Matouk's use of the word "immediately" is a hollow reed on which to base a finding of misconduct. It isn't supported in Detective Matouk's written report or Deputy Chief Donaldson's testimony. It also concerns an immaterial factual matter. Judge McCree concealed nothing from Detective Matouk and Deputy Chief Donaldson. Accordingly, Detective Matouk's testimony concerning when Judge McCree recused himself does not provide a basis for a finding of misconduct or any discipline.[108]

D. Alleged misconduct that was never charged cannot form the basis for discipline.

The JTC improperly relied on two alleged instances of misconduct that were not pleaded in its complaint. Under the label "Other Misconduct," the JTC's recommendation discussed a phone call that Judge McCree made to another judge's court reporter and a divorce complaint that he filed. Neither instance was alleged as a basis for finding misconduct before the JTC issued its recommendation. And even if it had alleged those instances, neither could justify a finding of misconduct.

"It is uncontroverted that judges, like all other citizens, have protected due process interests under the Michigan Constitution Const 1963, art. 1, § 17 and the Due Process Clause of the Fourteenth Amendment of the United States Constitution." *In re Chrzanowski*, 465 Mich 468, 483; 636 NW2d 758 (2001). Indeed, this Court has confirmed

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[108] And why would Judge McCree, who admitted to everything about his relationship with Mott (when they met, that she was a complaining witness, and that they had an affair) lie about when he recused himself from the case? Judge McCree knew that Detective Matouk and/or Deputy Chief Donaldson would obtain the court file and that the file would reflect the date that the case was transferred to Judge Callahan. What possible reason would Judge McCree admit all the "dirty details" and "lie" about the date he recused himself?

that "[a] determination of judicial unfitness must always be accompanied by the safeguards of procedural due process." *Matter of Probert*, 411 Mich 210, 231 n.13; 308 NW2d 773 (1981). In the analogous attorney discipline context, both this Court and the United States Supreme Court have held that due process requires that the respondent have notice of the charges against him. *In re Freid*, 388 Mich 711, 715; 202 NW2d 692 (1972) ("It is a fundamental rule of due process that a person must have notice of the charges against him."); *In re Ruffalo*, 390 US 544, 550; 88 S Ct 1222; 20 L Ed2d 117 (1968) ("[A lawyer] is accordingly entitled to procedural due process, which includes fair notice of the charge.").[109]

The court rules governing judicial tenure proceedings confirm that a judge has a right to notice of the charges against him. MCR 9.207(D)(1) provides that "the commission must give written notice to the judge who is the subject of a request for investigation" and that the "notice shall specify the allegations ..." The purpose of the notice is to give the judge a fair opportunity to respond. *Id.* Indeed, the rules were amended to "strengthen due process rights by providing judges with earlier and fuller notice ...." Staff cmt. to 2003 amendment. MCR 9.207(D)(1) would be mooted if the JTC could interject additional charges in the complaint (or even later, as it has here) without affording a judge an opportunity to respond. In addition, MCR 9.209(A)(2) requires the

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[109] This Court declined to apply *Ruffalo* in two judicial misconduct cases based on circumstances not present here. *Matter of Loyd*, 424 Mich 514; 384 NW2d 9 (1986); *In re Ryman*, 394 Mich 637; 232 NW2d 178 (1975). In *Ryman*, the uncharged misconduct was intrinsic to the proceeding—Judge Ryman lied during the hearing, which, obviously, could not be included in the complaint. In *Loyd*, the examiner timely moved to amend the complaint. See MCR 9.213. No such motion was made here.

complaint to conform to civil pleading standards, which require "specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." MCR 2.111(B).

The JTC never gave notice of charges concerning Judge McCree's phone call with a court reporter and the filing of a divorce complaint. It was not mentioned in the three 28-day letters sent under MCR 9.207, the original, or the amended complaint.

The divorce complaint was only referenced in an allegation concerning the truthfulness of the Judge McCree's response to the request for investigation. The JTC alleged that Judge McCree "stated that he filed for a divorce from his wife to keep Mott from disclosing their affair to his wife and family and to persuade Mott to terminate her pregnancy" and that that "representation was false."[110] Yet the JTC concluded that the act of filing the complaint constituted misconduct.[111] The JTC never alleged that the divorce complaint was filed in violation of MCR 2.114.

The JTC's moving target does not pass constitutional muster. Because the JTC failed to give Judge McCree notice and an opportunity to respond to allegations concerning the phone call and filing the divorce complaint, they cannot be considered as a basis for discipline. See *Freid*, 388 Mich at 715-716; *Ruffalo*, 390 US at 552.

In addition, Judge McCree's phone call to the court reporter was not misconduct. Anyone can call and speak with a court reporter or judicial clerk. The testimony

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[110] Complaint at ¶¶84-85; Amended Complaint at ¶¶84-85.

[111] See JTC Rec. at 13-14 (contending that Judge McCree violated MCR 2.114 when he filed a complaint because "he had no intention of going through with the divorce").

confirms that Judge McCree simply asked about the case status.[112] He did not attempt to influence the proceeding in any way. Judge McCree admits that he identified himself, but it cannot be the JTC's position that he was required to conceal his identity. There is no testimony that Judge McCree identified which party he knew or why he was calling about the case status. The phone call did not constitute misconduct under any standard.

Judge McCree's failure to effect proper service of a complaint is also not a basis for discipline. The JTC, citing MCR 2.103(A), claimed that it was misconduct for Judge McCree to personally serve his wife with the divorce complaint. If one ever wanted to prove that the JTC is overreaching, this does it. Judge McCree explained that, while trying to appease Mott, he agreed to file a divorce complaint. Mott continued to pressure him to "prove" that he would divorce his wife. Believing that serving the complaint would satisfy Mott, Judge McCree "served" the complaint. He did not plan to leave his wife. Neither filing nor serving the complaint was done to harass, embarrass, or impose needless litigation costs on anyone. Under such facts, no reasonable fact finder could find a basis to discipline a judge for misconduct.

II.

Under *In re Brown*, equivalent misconduct must be treated equivalently. Judge McCree acknowledges his misconduct in failing to timely recuse himself in *King* and that discipline is warranted. The *Brown* factors place Judge McCree's misconduct in the middle of its sliding scale. Analogous judicial discipline decisions have resulted in public censure or suspension not exceeding 1 year. Judge McCree has been suspended nearly 8 months without pay to-date.

[112] TR III at 777-778.

The JTC has recommended unprecedented discipline and pays only lip service to what it termed this Court's "call for 'proportionality' based on comparable conduct."[113] The JTC's analysis is void of comparison to similar cases. This glaring omission is not accidental. Had the JTC undertaken such an analysis, it would have been unable to justify a discipline that has **never been ordered before**—removal and a 6-year conditional suspension. Analogous cases impose, at most, a 1 year suspension.

It's apparent that the JTC does not like the constraints and directions this Court gave it in *In re Brown*, 461 Mich 1291; 625 NW2d 744 (2000). It has ignored prior cases and consistency in favor of meting out punishment based on its members' "individual and unstated consciences"—a methodology that this Court repudiated. *Id.* at 1292. The result is a draconian recommendation that would punish Judge McCree like no judge has been before. Because discipline must be "reasonably proportionate to the conduct of the respondent, and reasonably equivalent to the action that has been taken previously in equivalent cases," MCR 9.220(B)(2), the JTC's recommendation must be rejected.

A. Equivalent misconduct should be treated equivalently. To achieve equivalency in discipline, this Court has instructed the JTC to consider similar cases and a non-exclusive list of factors.

In *In re Brown*, this Court emphasized that "[t]he most fundamental premise of the rule of law is that equivalent misconduct should be treated equivalently." *Id.* 461 Mich at 1292. Judicial discipline matters cannot be evaluated "in a legal vacuum." Rather, "it is the burden of the JTC to persuade this Court that it is responding to

[113] JTC Rec. at 19.

equivalent cases in an equivalent manner and to unequivalent cases in a proportionate manner." *Id.* That ruling is codified in MCR 9.220(B)(2):

> The commission **shall undertake to ensure** that the action it is recommending in individual cases is **reasonably proportionate to the conduct** of the respondent, and **reasonably equivalent to the action that has been taken previously in equivalent cases.** [(Emphasis added).]

This proportionate and equivalency standard protects against overreactions and personal biases.

Brown adopted a non-exclusive list of factors to guide recommendations:

> (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
>
> (2) misconduct on the bench is usually more serious than the same misconduct off the bench;
>
> (3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;
>
> (4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;
>
> (5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;
>
> (6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;
>
> (7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the

system on the basis of a class of citizenship. [*Id.* at 1292-1293].

The *Brown* factors are best described as "weighted guidelines," setting forth a comparative scale in each factor instead of listing mitigating or aggravating facts. See *In re Coffey's Case*, 157 NH 156; 949 A2d 102 (2008) (describing *Brown* as "articulating a set of factors that differentiates the various gradations of judicial misconduct"). Since *Brown*, this Court has diligently applied the enumerated factors in an effort to reach consistent results. See *In re Logan*, 486 Mich 1050; 783 NW2d 705 (2010) ("[W]e are mindful of the standards set forth in *Brown*"; public censure for appearance of impropriety in arranging bond); *In re Halloran*, 486 Mich 1054, 1054; 783 NW2d 709 (2010) ("[W]e are mindful of the standards set forth in [*Brown*]."; public censure and 14-day suspension for a "deliberate pattern of misconduct on the bench" involving "the element of dishonesty" when judge dismissed 30 family law cases to give the appearance of complying with guidelines on the timely disposition of cases); *In re Steenland*, 758 NW2d 254 (Mich 2008) ("After reviewing ... the standards set forth in *Brown*"; public censure and 90 day suspension following conviction for operating a motor vehicle while visibly impaired).

This Court also commended the assessment of proportionality through reference to comparable disciplinary actions. *Brown*, 461 Mich at 1294-1295; see, e.g., *Haley*, 476 Mich at 188-189 (recommending public censure based on Ohio, Florida, and Pennsylvania cases in which the judges also accepted tickets and received public

reprimands); *In re Nettles-Nickerson*, 481 Mich 321, 338-339 (2008) (recommending removal based on Michigan cases in which judges were removed for lying under oath).

B. A proper assessment of the *Brown* factors does not warrant removal and/or a 6-year suspension.

A review of the *Brown* factors places Judge McCree's misconduct in the middle of *Brown*'s sliding scale.

1. Misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct.

Judge McCree acknowledges that this factor indicates more serious misconduct. His failure to recuse himself in *King* extended over several months. But, as Drs. Jacobi and Longs testified, Judge McCree's behavior has been consistent with an extended period of hypomania. This conduct is out of character for Judge McCree and hypomania is treatable.

The JTC's analysis of this factor overreaches. The JTC cryptically refers to Judge McCree taking "steps to maintain the secrecy of his relationship while the matters were pending." It does not say what the "steps" were. In fact, the testimony was that Judge McCree was less than discrete about the affair.[114] The JTC also refers to "a pattern of dishonesty." The alleged "dishonesty" involved Judge McCree's "oversight" testimony, Detective Matouk's "immediate" recusal testimony, and two uncharged allegations of

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[114] See TR II at 445-446 (testimony of Judge Boykin that Judge McCree took Mott to a Detroit Barristers Association event and that he often saw her at the court and in the parking lot with Judge McCree); TR III at 643-644, 652 (testimony of Dr. Longs that Judge McCree told him about the affair and invited Mott to Dr. Longs's home); TR I at 67 (Mott's testimony that she would accompany Judge McCree to football games, church, and their kids' activities).

misconduct. Each issue has been addressed in this brief. Judge McCree did not lie under oath, much less engage in a "pattern of dishonesty." He has, at all times, been truthful about his affair and his failure to timely recuse himself.

2. **Misconduct on the bench is usually more serious than the same misconduct off the bench.**

Judge McCree's admits that his decision to go forward with the August 16 hearing in *King* was misconduct on the bench. Once again, the JTC overreaches by referencing conduct that took place off the bench and attempting to portray it as "on the bench" misconduct. This factor does not require any strained extension. The simple truth is that, with the exception of the August 16 hearing, the balance of the alleged misconduct occurred off of the bench. This factor reflects misconduct that is more serious as to *King*, but less serious as to all other allegations of misconduct.

3. **Misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety.**

The JTC's analysis of this factor exemplifies its overreaching. This factor addresses misconduct that "**is prejudicial** to the **actual** administration of justice." *Brown*, 461 Mich at 1293 (emphasis added). The testimony is consistent on one point: there was no obstruction or harm to the administration of justice. Each case Judge McCree handled proceeded as it normally would. Judge McCree's failure to recuse himself in *King* is "prejudicial only to the appearance of propriety." *Id.*

Yet the JTC claims that this factor supports a "more serious sanction" because a neutral judge "is one of the central tenets of our judicial system." The perceived

neutrality of a judge, without actual prejudice, only concerns the "appearance of propriety." The JTC fails to cite any **actual** prejudice to King or anyone else. Indeed, the prosecutor and King's counsel confirmed that King was treated exactly the same as any other felony nonsupport defendant who fails to meet his payment obligations under a delayed sentence agreement, i.e., placed on a tether until payment is made current.[115]

The JTC's alternative rationale—"misrepresentations to the Commission and the Master"—is meritless for the reasons previously discussed in this brief. Judge McCree's misconduct is "less serious" under this factor.

4. Misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does.

Judge McCree admits that his failure to recuse himself before the August 16 hearing in *King* implicates the appearance of impropriety. His misconduct was more serious than conduct that does not implicate the appearance of impropriety.

5. Misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated.

Judge McCree's failure to recuse himself in *King* cannot be considered "spontaneous." But, again, the JTC attempts to pile on, cryptically referring to "steps to maintain the secrecy of the relationship" without any description of the "steps." Indeed, there were no "steps." The JTC's empty analysis should be rejected. Moreover, this Court should consider the mitigating impact of Judge McCree's hypomania on this factor. While his actions were not spontaneous, Judge McCree was also not himself and

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[115] TR I at 233; TR II at 377-378 (testimony of Frederick Smith, attorney for King, that it was "an advantage" for King to be placed on a tether "because he didn't have to lose his rights").

his medical condition caused him to lose "that ability to manage [himself] prudently and cautiously."[116]

6. **Misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery.**

Judge McCree's misconduct did **not** undermine "the ability of the justice system to discover the truth ... or to reach the most just result in such a case," because, as all who testified in this case agree, each case proceeded as it normally would have. The JTC's analysis of this factor does not rest on any actual undermining of the truth seeking function of the justice system or the actual result in any case. All agree that King did not meet his child support obligations. All agree that placing King on a tether worked to his benefit and was done in similar cases "all the time."[117] All agree that Tillman was released because he paid the bond ordered by Judge Robbins. Covington confirmed that Judge McCree did not intervene or get Tillman released any earlier or later than he should have been.

7. **Misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.**

Even the JTC conceded that race, color, ethnic background, gender, or religion had nothing to do with Judge McCree's misconduct.

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[116] TR III at 580.

[117] TR I at 233.

A fair assessment of the *Brown* factors shows that Judge McCree's misconduct was:

(1) "more serious" under four factors,

(2) "less serious" under three factors, and

(3) mitigated by his hypomania, for which he has received treatment.

Judge McCree's misconduct is in the middle of *Brown*'s sliding scale; a position that does not warrant removal or a 6-year suspension.

C. A review of comparable cases establishes that the JTC's recommendation is disproportionate and constitutionally infirm.

In re Templin, 432 Mich 1220; 346 NW2d 663 (1989) is the most analogous Michigan case. This Court publicly censured Judge Templin after he admitted that he "dated" a criminal defendant while her case was pending before him. The criminal case involved charges of breaking and entering an occupied dwelling with intent to commit criminal sexual conduct in the third degree. The case was headlined as a "real life fatal attraction" and received extensive media coverage both locally and nationally. During the time the case was pending, Judge Templin signed five orders relating to the case, including an order remanding the case to the district court for a preliminary examination. The prosecutor contested the remand order. Judge Templin's relationship with the defendant came to light after he signed the remand order. He subsequently disqualified himself from the case, listing the reason for his disqualification as "interested as a party." Even the disqualification received extensive media coverage.

The JTC concluded that Judge Templin's conduct constituted "(a) an appearance of favored treatment as well as an appearance that improper *ex parte* communication may have taken place, contrary to the Code of Judicial Conduct Canon 3A ; (b) failure to promptly raise the issue of disqualification as required by the Code of Judicial Conduct Canon 3C; and (c) failure to avoid conduct which erodes confidence in the judiciary as proscribed by the Code of Judicial Conduct, Canon 2A ." *Id.* at 1221. The JTC recommended that Judge Templin be publicly censured – a sanction that Judge Templin agreed was appropriate. This Court accepted the recommendation and publicly censured Judge Templin.

The Examiner is dismissive of *Templin* because it pre-dated *Brown*. But this Court's pre-*Brown* discipline orders were neither based on guesswork nor determined by throwing darts at a board. This Court has always thoughtfully reviewed the record and considered the discipline that it has imposed in similar cases. See *Matter of Hocking*, 451 Mich 1, 5-6; 546 NW2d 234 (1996) (determining appropriate discipline "[a]fter reviewing the record in this case and the discipline this Court has imposed in similar cases of judicial misconduct"). In other words, while *Brown* expressed concern with **the JTC's methodology** in recommending discipline,[118] this Court did not dismiss its own precedent as providing appropriate guideposts for discipline. Indeed, *Brown*'s direction

[118] *Brown*, 461 Mich at 1292 ("Increasingly, justices of this Court have concluded that review of the JTC's disciplinary recommendations is hampered because the standards by which the JTC is producing its recommendations is not apparent. There is an insufficient articulation of the connectedness between the findings of fact in an individual case and the recommended discipline.").

for the JTC to make comparisons with prior discipline orders to achieve proportionality inherently required the JTC to consider pre-*Brown* orders like *Templin*.

Several post-*Brown* decisions underscore the disproportionality of the JTC's recommendation in this case. *In re Logan*, 486 Mich 1050, provides a helpful comparison for this case. There, James Vaughn, a county commissioner, was arrested and charged with aggravated domestic assault. Later that day, Paul Mayhue, another county commissioner, visited Vaughn and then called Judge Logan. A series of phone calls followed, the longest of which was a 15 minute call at 2:08 p.m. from Mayhue to Judge Logan. Though he was not handling arraignments that day, Judge Logan directed his staff to obtain the initial police report and, at 2:30 p.m., directed that they send a fax to the jail, reporting that he had set a personal recognizance bond for Vaughn with special conditions. *Id.* at 1051. Vaughn was released at 2:50 p.m. without notice to the investigating detective. *Id.*

The JTC found that Judge Logan committed misconduct in office that "created the appearance of impropriety, which erodes public confidence in the judiciary" and was "clearly prejudicial to the administration of justice." *Id.* at 1052. The JTC reached a settlement agreement with Judge Logan and recommended public censure, which this Court accepted.

In re Logan is analogous to this case because Judge Logan should not have acted after Mayhue contacted him about Vaughn's arrest. Judge Logan should have recused himself. But he did not and, in failing to do so, he "created the appearance of

impropriety, which erodes public confidence in the judiciary," which merited a public censure.

In re Logan is also distinct from this case in two important respects. Unlike Judge Logan, Judge McCree did not interject himself into a matter that was not before him. Also unlike Judge Logan, Judge McCree did not abuse his authority to give preferential treatment to a party. Vaughn was released from jail earlier than he otherwise would have been because of Judge Logan's action. But all of the testimony in this case is that both *King* and *Tillman* were handled no different than any other case. Judge Logan not only failed to recuse himself, he intervened to give preferential treatment for a politician charged with aggravated domestic assault. His public censure cannot be reconciled with the JTC's recommended removal and six-year suspension in this case. See also *In re Halloran*, 466 Mich 1219; 647 NW2d 505 (2002) (respondent judge was censured and suspended for 90 days after being arrested for soliciting sex in a public restroom).[119]

There are, unfortunately, several judicial misconduct cases from other jurisdictions that involved sexual relationships (including affairs) that created conflicts

[119] Even when the respondent judge violated a criminal law, this Court, under its post-*Brown* decisions, has imposed suspensions ranging from 90-180 days. See *In re Nebel*, 485 Mich 1049 (2010) (90-day suspension for driving under the influence in violation of MCL 257.625(3), a misdemeanor); *In re Steenland*, 482 Mich 1229; 758 NW 2d 254 (2008) (same); *In re Conrad*, 472 Mich 1242; 696 NW2d 702 (2005) (180-day suspension when the respondent was arrested twice for driving under the influence in violation of MCL 257.625); *In re Gilbert*, 469 Mich 1224; 668 NW2d 892 (2003) (90-day suspension for using marijuana, a controlled substance). This Court's suspension remained consistent in *Gilbert* even though the matter received considerable publicity: "Respondents actions were well-publicized in the press in western Michigan, received significant attention in the media around metropolitan Detroit, were referenced by national news services, and were the subject of a joke by comedian Jay Leno on *The Tonight Show*." *Id.* at 893.

of interest warranting recusal. The discipline in those cases has ranged from public reprimands to a 45 day suspension. For example, in *In re Adams*, 932 So2d 1025 (2006), the Florida Supreme Court held that a public reprimand was the appropriate disciplinary sanction for a judge who entered into a romantic relationship with a lawyer who regularly practiced before him because "there was no evidence that the relationship actually influenced the disposition of any matter before the judge." *Id.* at 1028. The same is true here. See also *In re Gerard*, 631 NW2d 271 (Iowa, 2001) (judge who had an affair with an assistant **prosecutor that regularly appeared in his court** was suspended 45 days); *In re Snyder*, 336 NW2d 533 (Minn, 1983) (judge engaged in affair with subordinate employee **and signed a show cause order in her divorce action** was publicly censured); *In re Kivett*, 309 NC 635, 645-648, 666, 673; 309 SE2d 442 (1983) (judge was publicly censured because he engaged in "illicit sexual relations" with the assistance of another individual which **gave that person undue influence** in matters that came before the judge).[120]

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[120] An extra-marital affair alone doesn't warrant discipline. See *Matter of Dalessandro*, 483 Pa 431; 397 A2d 743 (1979); see also *In re Chrzanowski*, 465 Mich 468, 490; 636 NW2d 758 (2001) (respondent judge engaged in an affair, but this Court expressly stated that she was "being disciplined **only for** her improper appointments of counsel, her failure to disclose those appointments, and for her false statements to the interviewing officers" (emphasis added)). But additional facts attendant to such relationships may warrant some form of discipline, which is often a public censure or reprimand. See *In re Lee*, 336 So2d 1175 (Fla, 1976) (judge who had sex with a woman not his wife in a car parked in a public parking lot received a public reprimand); *In re Flanagan*, 240 Conn 157; 690 A2d 865 (1997) (public censure for a judge who had an affair with subordinate employee); *In re Harrelson*, 376 SC 488, 490-491; 657 SE2d 754 (2008) (magistrate judge consented to reprimand based on affair with administrative employee that he had supervised).

This Court should also consider the four "conditional suspension" cases that the JTC cited. *In re Probert*, 411 Mich 210; 308 NW2d 773 (1981); *Matter of Bennett*, 403 Mich 178; 267 NW2d 914 (1978); *Matter of Del Rio*, 400 Mich 665; 256 NW2d 727 (1977); *Matter of Mikesell*, 396 Mich 517; 243 NW2d 86 (1976). First, none of those cases imposed removal **and** a suspension. There is no precedent for such a punishment. Indeed, in *In re Nettles-Nickerson*, 481 Mich at 323, this Court expressly rejected a recommendation to remove and conditionally suspend a judge. Three JTC members—Hon. Kathleen McCann, Hon. Jeanne Stempien, and Marja M. Winters—filed a partial dissent to the JTC's recommendation in which they observed that, "On no prior occasion has the Supreme Court imposed additional discipline over and above removal from office, including a case involving *quid pro quo* bribery." *Id.* at 343.

The lack of precedent foreshadows the serious constitutional concerns raised by the JTC's recommendation. This Court has previously interpreted its authority to be consistent with that of its coordinate branches. See *Matter of Probert*, 411 Mich at 232-233 & n.18 (holding that this Court cannot permanently enjoin a judge from holding a judicial office). "Even in the case of the most extreme civil sanction that can be inflicted upon a judge—impeachment—the penalty 'shall not extend further than removal from office.'" *Id.*, quoting Const 1963, art 11, § 7; see also Const 1963, art 6, § 25 (authorizing the Governor to remove a judge). Michigan law affords the voters the right to chose who will hold judicial office. Const 1963, art 2, § 1; *id.* at art 6, §§ 2, 8, 12, 16, 26; see also MCL 168.467 *et seq.* While the JTC's recommendation falls short of a permanent injunction against holding judicial office, it does so only in a technical sense. Const 1963,

art 6, § 30[121] "could" also be interpreted to permit a 100 year suspension. But the JTC has given no reason for interpreting the Constitution to permit this Court to disenfranchise the electorate when neither the legislative branch nor the executive branch could affect such a result. If this Court removes a judge and the electorate chooses to re-elect that judge, the electorate's choice must be respected. Accepting the JTC's recommendation would constitute an unprecedented power grab, declaring authority unique to this Court that is not expressly granted in the Constitution and is at odds with the right of Michigan voters to choose their judicial officers.

Second, in each case that the JTC cited, the suspension started on the date of the decision, not some later contingent time. This Court determined an appropriate suspension length and explained that the suspension would continue if the respondent was re-elected. Here, the JTC has recommended a suspension that would not even start until January 1, 2015. There is no precedent for such a punishment.

In addition, though each case involved factually distinct subject matter, the discipline ordered in each is instructive. Judge Probert and Judge Del Rio were, for the lack of a better word, terrors. Each received a 5 year suspension. This Court's opinion gave scant details on Judge Probert's misconduct, but it involved:

- "[A]lteration of court and police records";
- "[P]erjury in the court records";

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[121] Const 1963, art 6, § 30(2) provides that this Court "may censure, suspend with or without salary, retire or remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice."

- "[F]alsification of judicial records";
- "[R]efusal to obey an order of a superior court";
- "[P]ublic intoxication" and accompanying "notorious, flagrant, and boorish behavior in the bars around Wyoming, Michigan";
- Telling criminal defendants that there were "'pimps, murderers and homosexuals out at the Kent County Jail' and the defendants would be 'some fresh meat for them'";
- Referring to a "defendant as a 'little bastard' from the bench";
- Making "demeaning, sarcastic remarks about [a] defendant's admitted homosexuality [which] made it obvious that Judge Probert sentenced him not for what he did, but for what he was"; and
- During several preliminary examinations and trials, he "interfered with the normal course of these proceedings and sought to obtain the desired result without the formality of a trial." [411 Mich at 234-236.]

Judge Del Rio's offenses were detailed in this Court's opinion and span too far and wide to do justice in a summary. The best description was quoted in *Brown*: "'If [Judge Del Rio's] record of misconduct were divided equally among ten judges, there would be enough evidence to warrant removal of each of them.'" 461 Mich at 1294, quoting *Del Rio*, 407 Mich at 350.

The JTC would have this Court impose a suspension that is **more severe** than Judge Probert and Judge Del Rio's suspensions. But Judge McCree's misconduct doesn't even begin to approach the outer boundaries of the repeated, abusive, and flagrant misconduct that this Court addressed in *Probert* and *Del Rio*. Judge McCree's inequivalent misconduct does not warrant equivalent (much less harsher) punishment.

This Court suspended Judge Bennett for one year. Judge Bennett used his position to gain access to the Register of Deeds after hours, repeatedly used profane and

obscene language on and off of the bench, willfully violated a superintending control order, and participated in "mudslinging" during a campaign for a legislative office. Though a far cry from Judge Probert and Judge Del Rio's misconduct, Judge Bennett's misconduct exceeds Judge McCree's failure to timely recuse himself by leaps and bounds.

In re Mikesell is also instructive. Judge Mikesell, a former prosecutor, would frequently intervene during trials to place a thumb on the scales of justice in favor of the prosecutor. Judge Mikesell also abused his authority by issuing superintending control orders and threatening contempt and incarceration against members of the prosecutor's staff. This Court rejected the JTC's removal recommendation and, instead, suspended Judge Mikesell for one-and-a-half years. Unlike Judge Mikesell, Judge McCree's misconduct did not affect the result of any case and did not involve threats or abuse directed toward litigants or attorneys.

In re Chrzanowski, 465 Mich 468, also provides an important measuring stick. Judge Chrzanowski had an affair with a married attorney, who she appointed to represent 56 criminal defendants. She did not disclose their affair or recuse herself from those cases. After the attorney shot his wife, Judge Chrzanowski inaccurately told a police detective that the affair ended five months earlier and that she had not spoken with the attorney since his wife's death. The JTC filed a complaint charging Judge Chrzanowski with misconduct in appointing the attorney in cases before her without disclosing the affair and making false statements to the police. This Court ordered an interim suspension with pay. The JTC recommended suspending Judge Chrzanowski

for one year without pay. This Court accepted the recommendation with an important modification aimed at recognizing the impact of an interim suspension: "In a democratically elected judicial system, such as we have in Michigan, suspension of a judge from judicial activities is itself a sanction with considerable consequences, and we believe that respondent has incurred many of those consequences." *Id.* at 489. Accordingly, this Court gave Judge Chrzanowski a six-month credit for her seventeen-month interim suspension, even though the suspension was with pay. *Id.*

Pursuant to this Court's interim suspension order, Judge McCree has been suspended **without** pay since February 8, 2013.[122] As of the October 8, 2013 filing date for this brief, Judge McCree has been suspended for 242 days (8 months). Judge McCree has not tried to minimize his misconduct and he does not claim that anything less than a suspension is warranted. But his 242-day suspension far exceeds the discipline ordered in *Templin, Logan* and analogous foreign cases (it is over 5.2 times more than the suspension ordered in *Gerard*). Judge Chrzanowski presided over 56 cases in which her extra-marital affair merited recusal, and she received a 1 year suspension with credit for six months. Judge Chrzanowski's 6-month credit was based on her 17-month suspension with pay; Judge McCree's suspension has been without pay.

Because he acknowledges his misconduct, "equivalent misconduct should be treated equivalently," *Brown*, 461 Mich at 1292, and because his unusual interaction with a complaining witness was likely influenced by a treatable medical condition,

[122] Judge McCree has actually been off the bench even longer. On December 9, 2012, Wayne Circuit Court Chief Judge Virgil Smith placed Judge McCree on "indefinite leave." As a result, Judge McCree has been off the bench for an additional 61 days.

with a complaining witness was likely influenced by a treatable medical condition, Judge McCree requests that this Court enter an order censuring him and suspending him no longer than the duration of the interim suspension.

Conclusion

Before accepting the JTC's recommendation, this Court must ask whether Judge McCree is the type of jurist who deserves to be removed or to serve a lengthy suspension. Whether a judge who "treats people fairly, with respect" is deserving of the most severe discipline available?[123] Whether a judge who has consistently managed a "very busy docket" – indeed, one of the busiest in the state – in an efficient manner must be removed from the bench?[124] Whether a judge who has never been disrespectful to parties, attorneys or witness[125] and who "basically everyone loves" should not be allowed to serve the people who elected him for over seven years?[126]

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[123] TR I at 241 (testimony of Chief Bivens).

[124] TR I at 226 (testimony of APA Grier); see also TR II at 371-372 (testimony of Frederick Smith).

[125] TR I at 227 (testimony of APA Grier).

[126] TR I at 227 (testimony of APA Grier); see also TR I at 241 (testimony of James A. Bivens, Jr., the Chief of Investigations for the Wayne County Prosecutor, that Judge McCree "treats people fairly, with respect"); TR II at 444 (testimony of Wayne Circuit Court Judge Boykin that Judge McCree "treated everyone with respect. And I mean everyone, witnesses, litigants. He was very cordial, and he was an early riser. You saw he was in court on time, and was very enthusiastic about his job."); TR II at 352 (testimony of Wayne County Assistant Prosecutor Nancy Neff that Judge McCree never acted disrespectful and has "always been very professional"); TR II at 355-356 (testimony of Susan Reed, president of the Wayne County Criminal Defense Bar Association, that "attorneys enjoy going into" Judge McCree's courtroom because "[h]e treats everyone with respect" and his "temperament on the stand, I believe, is what a judge should be. Again, he's knowledgeable. ... He has a horrendous docket there, and he manages to move the docket without shortchanging anyone in the

Respectfully, that is emphatically not the type of jurist who should receive removal or a 6-year suspension. Judge McCree's misconduct is not equivalent to those judges who have been removed from the bench. This Court should not accept the JTC's invitation to blaze a new, draconian path. This Court should enter an order censuring Judge McCree and suspending him for the duration of his interim suspension.

Respectfully submitted,

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room."); TR II at 371-372 (testimony of Frederick Smith, King's defense attorney, that Judge McCree is "enthusiastic" and "very efficient" compared to other judges handling felony nonsupport dockets and that "he will make some matters that are very tense and serious a lot more bearable to the litigants" and he "never disrespects any of the litigants").

STATE OF MICHIGAN

IN THE SUPREME COURT

COMPLAINT AGAINST:

Hon. Wade H. McCree
Wayne County Circuit Court
Frank Murphy Hall of Justice
1421 St. Antoine, Room 202
Detroit, MI 48226

S. Ct. No.: 146826

Formal Complaint No. 93

CERTIFICATE OF SERVICE

JUDICIAL TENURE COMMISSION
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James M. Strugs says that on the 7th day of October 2013, he served three (3) copies of *Respondent the Honorable Wade H. McCree's Petition to Reject and/or Modify the Judicial Tenure Commission's Recommendations and this Certificate of Service* on:

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Judicial Tenure Commission
3034 W. Grand Blvd., Ste. 8-450
Detroit, Michigan 48202

by placing same in sealed envelope(s) with postage fully prepaid thereon, and depositing same in the United States Mail receptacle.

James M. Strugs

2006 WL 1540781
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Andris PUKKE, Plaintiff-Appellant/Cross-Appellee,
and
Seaspray Holding, Ltd, and Michael Buchard, Plaintiffs-Appellants,
v.
HYMAN LIPPITT, P.C., Defendant-Appellee/Cross-Appellant,
and
Terry Givens, Defendant-Appellee,
and
John Does # 1 Through # 50, Defendants.

Docket No. 265477. | June 6, 2006.

Synopsis
Background: Investors brought action against law firm, attorney, and other defendants, alleging violations of the Michigan Uniform Securities Act (MUSA), legal malpractice, fraud, and breach of fiduciary duty, in connection with the purchase of offshore investment fund securities. Law firm and attorney moved for summary disposition, asserting that securities claims were precluded under MUSA, and legal malpractice-related claims were barred by statute of limitations. Investors filed a motion for judicial disqualification, which motion was denied. The Circuit Court, Oakland County, Tyner, J., granted the motion for summary disposition. Investors filed postjudgment motions for relief from judgment and for referral of the motion for judicial disqualification. Motions were denied. On motion to disqualify, the Circuit Court, Oakland County, Wendy Potts, C.J., entered an order denying the disqualification. Investors appealed. law firm and attorney brought cross-appeal.

Holdings: The Court of Appeals held that:

[1] investors' MUSA claims accrued when Securities and Exchange Commission (SEC) issued press release announcing fraud action against investment advisor and creator of fund;

[2] investors' legal malpractice claims against their law firm and lawyer accrued when SEC issued press release announcing fraud action;

[3] investors stated fraud and breach of fiduciary duty claims that were not duplicative of investors' time-barred legal malpractice claims;

[4] investors sufficiently alleged that law firm was a controlling person under MUSA; and

[5] allegations of prejudice or bias were insufficient to require judge's disqualification.

Affirmed in part, reversed in part, and remanded.

Oakland Circuit Court; LC No. 05-064013-NM.

Before: MURPHY, P.J., and O'CONNELL and MURRAY, JJ.

Opinion

[UNPUBLISHED]

PER CURIAM.

*1 Plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7) and (8).[1] We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Background

A. Factual Background

This case arises out of the formation and registration of an "offshore" investment fund, Agave Ltd ("Agave"), and the sale of its securities to plaintiffs. The following background is taken from plaintiffs' complaint.[2]

Hyman Lippitt, P.C., is a law firm in Birmingham, Michigan, representing that it was experienced in business planning and securities law and had expertise in offshore tax planning and asset protection. Keith Mohn, an investment advisor and client of Hyman Lippitt, referred several of his clients to Hyman Lippitt's Offshore Practice Group, which was headed by Terry Givens, Esq. One such client who was referred to Hyman Lippitt for investment purposes was J. Patrick Kisor.

In April 2000, Givens met with Mohn, Kisor and Kisor's associate, Dennis Drabeck. During the meeting, Givens informed Mohn and Kisor that Hyman Lippitt could create an investment vehicle for clients of Hyman Lippitt's Offshore Practice Group for a fee of $125,000. Kisor paid the fee and became a client of Hyman Lippitt.

Thereafter, Givens formed GNT as a Cook Islands trust company. GNT was used to create Agave, which operated under the laws of the Cook Islands. Givens established the structure of Agave with three classes of shareholders, classes A, B and C. Pippa Kerry was the sole Class A Shareholder and Director. Class B shares were sold to those who invested up to $500,000, and Class C shares were sold to those who invested $500,000 and above. Either Givens or other attorneys from Hyman Lippitt prepared the documents that investors used to purchase Class B and C shares of Agave.

The investors were provided with little information about the investment opportunity. The investors were given "generic information" about the "risk neutral" options strategy used by Kisor, which they were told was yielding earnings "in excess of 2% per month." The investors were not told of the risks involved in investment in a company organized under the laws of the Cook Islands nor were they told of the risks of investing in unregistered securities where an exemption may not be available. Moreover, the investors were not provided with any information on Kisor's background and experience. Nor were they informed that Kisor managed Agave's funds at EDF Mann by a general rather than a limited Power of Attorney, which allowed him to embezzle funds and invest funds in unauthorized investments.

In October 2000, investments in Agave began and continued through May 2002, by which time the total investment amount reached approximately $31 million. Plaintiff Pukke was referred to Hyman Lippitt by Mohn in 1999. In the course of its representation of Pukke, Hyman Lippitt formed plaintiff Seaspray Holding, Ltd. ("Seaspray"), which operated under the laws of the West Indies. Before investing in Agave, plaintiff Michael Buchard and other representatives of Seaspray met with Mohn and Givens, and were assured by Givens that Hyman Lippitt represented Kisor, it had done "due diligence" on Kisor, Kisor's operation was legitimate and the returns on the investments were as represented. In reliance on these representations and Hyman Lippitt's competence, Seaspray and Buchard invested in Agave.

*2 In early 2001, Givens transferred the preparation and mailing of monthly account statements from GNT to Hanver, Ltd., a West Indies company. The monthly statements contained data regarding Agave's positions and values transmitted electronically from Kisor. However, the data that Kisor supplied was incorrect and was used to conceal his misappropriation of Agave's funds and unauthorized investments.

In June 2001, at Given's direction and through Hyman Lippitt's legal work, Agave acquired a seat on the Chicago Board of Options Exchange ("CBOE") in the name of Agave employee, Gil Howard. Agave paid Howard a bonus adequate enough to pay necessary income taxes and still purchase the seat.

Also in the summer of 2001, Hanver told Givens and Mohn that it suspected that Kisor was providing inaccurate account data. On February 9, 2002, after being asked to provide financial statements for the previous year, Kisor confessed his misconduct to Mohn, who informed Givens. On February 10, 2002, Givens told EDF Mann that Kisor's Power of Attorney had been terminated and instructed it to transmit all the money in the account to Agave, care of GNT. Givens and Mohn discovered that of the approximately $31 million invested, only about $10 million in cash remained. Kisor had embezzled at least $5 million and had placed the remaining $15 million into investments inconsistent with the strategy that Kisor had presented to investors.

In March 2002, Givens established Genesis L.L.C. ("Genesis"), a Michigan limited liability company, and placed Mohn as the manager. Givens directed Hanver and GNT to issue Genesis shares to Agave's U.S. investors. Givens also had the approximately $10 million in Agave's account transferred to a newly created Genesis account Givens advised Hanver that it should not disclose Kisor's improper conduct to the investors, that the investment values reported to Hanver were correct and that Hanver should continue to disburse statements reflecting those values to the

investors. In June 2002, Givens left Hyman Lippitt and moved to Chicago to manage both Agave and Genesis.

The SEC began investigating Kisor's activities. In August 2002, Mohn was subpoenaed in connection with the investigation. Givens advised Mohn that he did not need representation and was not required to answer any questions. Mohn met with SEC attorneys without counsel and answered their questions. On November 22, 2002, the SEC commenced *Securities and Exchange Commission v Mohn* (Case No. 02-74634) (the "SEC Action"), in the Eastern District of Michigan against Kisor, Mohn, Agave and others, alleging that the issuance of Agave shares violated the registration and antifraud provisions of the federal securities laws. The SEC seized the assets of Agave and Genesis. Hyman Lippitt agreed to represent Mohn in the SEC action, but never told Mohn or anyone else that it had created and previously represented Agave and Genesis.

Plaintiffs asserted that, Givens and Hyman Lippitt concealed their roles in the investment scheme. Givens advised Hanver that Kisor's misappropriation and mishandling of the investments should not be disclosed to the investors since it might cause a "run on the bank." Throughout its representation of Mohn, Hyman Lippitt concealed its role by failing to advise Mohn to assert the "advice of counsel" defense, and by rejecting two receivers that the SEC proposed, and recommending Bradley Schram be appointed as receiver because he had an established personal and business relationship with Hyman Lippitt and the law firm believed that he would not investigate or pursue claims against it. Plaintiffs also asserted that Hyman Lippitt was aware that Kisor's misappropriation of funds was allowed to occur because it prepared and authorized the use of a general Power of Attorney for Kisor, the scope of which was contrary to the customs and standards of the financial industry. Plaintiffs further asserted that Hyman Lippitt was aware that the issuance of Agave shares did not comply with federal and state securities laws.

B. Procedural Background

*3 On February 1, 2005, plaintiffs filed their initial complaint, and on February 3, 2005, plaintiffs filed an amended complaint against defendants, alleging five counts: (1) control person liability under MCL 451.810(b) because of the unregistered sale of securities in violation of MCL 451.810(a)(1); (2) control person liability under MCL 451.810(b) because of the sale of securities by misrepresentation and/or omission in violation of MCL 451.810(a)(2); (3) legal malpractice; (4) fraud; and (5) breach of fiduciary duty.

On April 15, 2005, defendants Hyman Lippitt and John Does # 1 through # 20 (collectively, "Hyman Lippitt"), later joined by Givens, filed a motion for summary disposition under MCR 2.116(C)(7) and (8). Hyman Lippitt contended that plaintiffs were precluded from asserting claims against it under the Michigan Uniform Securities Act ("MUSA"), MCL 451.501 *et seq.*, because they failed to bring a cause of action against the seller of the securities, and Hyman Lippitt was not a member of a class that could be sued under the MUSA since it could not be held liable under a common law theory of liability. Hyman Lippitt further contended that plaintiffs' claim of unregistered sale of securities was barred by the two-year statute of repose and that Michigan's fraudulent concealment statute did not toll application of the statute of repose. Similarly, Hyman Lippitt asserted that plaintiffs' claim of material misrepresentations and omissions in the sale of securities was also time-barred under the MUSA because some sales occurred more than four years before plaintiffs filed the instant action and the remaining sales occurred more than two years after plaintiffs knew or should have known of the alleged misconduct. Hyman Lippitt claimed that the press release of the SEC complaint in November 2002 placed plaintiffs on notice of a possible cause of action against defendants, and the subscription agreement placed plaintiffs on notice of the risks involved in the investments.

Hyman Lippitt also argued that plaintiffs' legal malpractice claim must be dismissed because plaintiff Buchard did not assert an attorney-client relationship, Givens ceased representation more than two years before the claim was filed, and plaintiffs were aware of a possible cause of action in November 2002. Hyman Lippitt further argued that plaintiffs' fraud and breach of fiduciary duty claims were merely duplicative of the legal malpractice claim. Finally, Hyman Lippitt contended that plaintiffs' theory of fraudulent concealment lacked merit because there was no showing of affirmative acts of concealment, and the statute of limitations would not toll where a plaintiff could have discovered the alleged fraud from public records.

On May 17, 2005, plaintiffs filed a response to defendants' motion for summary disposition, contending that (1) they were entitled to assert claims against Hyman Lippitt and Givens under the MUSA without obtaining a judgment or

contemporaneously filing a claim against the actual seller; (2) Hyman Lippitt and Givens were both liable under the MUSA as control persons; (3) the saving provision of the fraudulent concealment statute may be applied to toll the limitations periods in the MUSA; (4) the SEC action did not place them on inquiry notice of Hyman Lippitt's involvement; and (5) the same set of facts can support more than one cause of action, and they adequately alleged facts sufficient to support their additional claims of fraud and breach of fiduciary duty.

*4 At the beginning of the hearing on defendants' motion for summary disposition, the trial court denied plaintiffs' motion to disqualify .[3] The parties then reiterated their arguments regarding defendants' motion. On August 9, 2005, the trial court entered a written opinion and order. The trial court rejected defendants' assertions that the seller must be joined as a party in order for plaintiffs to prevail against defendants under the MUSA, and that Hyman Lippitt did not fall within a class that could be sued under the MUSA. Nevertheless, the trial court granted defendants' motion for summary disposition.

Specifically, the trial court dismissed counts I and II of plaintiffs' complaint alleging violations of securities laws because the statue of limitations had expired and there was insufficient evidence of fraudulent concealment. The trial court further held that count III of plaintiffs' complaint regarding legal malpractice was barred by the statute of limitations because the complaint was filed more than two years after Givens stopped providing legal services to plaintiffs and more than six months after plaintiffs knew or should have known that they had a cause of action against defendants. The trial court noted that plaintiffs were on notice of the potential claims in this matter as of November 2002 when the SEC filed its complaint. Finally, the trial court granted defendants' motion regarding the claims of fraud and breach of fiduciary duty, concluding that these claims were "mere restatements of the legal malpractice claim."

Plaintiffs filed postjudgment motions for settlement of the order documenting the trial court's denial of their motion to disqualify, for referral of their motion for disqualification to the Chief Judge of the Oakland Circuit Court, and for relief from judgment. The trial judge entered a written order denying plaintiffs' motion for judicial disqualification based on the reasons stated on the record. The trial judge also denied plaintiffs' motion for relief from judgment as untimely filed and failing to show a palpable error whereby the court and the parties were misled. After hearing oral arguments on plaintiffs' motion to disqualify, Oakland County Circuit Court Chief Judge Wendy Potts entered an order denying the motion, finding that plaintiffs failed to overcome the presumption of judicial impartiality.

II. Analysis

A. Statute of Limitation/Statute of Repose

Plaintiffs' primary contention is that the trial court erred in concluding that their MUSA claims were time-barred. A trial court's grant or denial of summary disposition under MCR 2.116(C)(7) and (8) is a question of law that we review de novo. *Hazle v. Ford Motor Co.,* 464 Mich. 456, 461, 628 N.W.2d 515 (2001). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a complaint and "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v. Rozwood,* 461 Mich. 109, 119, 597 N.W.2d 817 (1999). The legal sufficiency of the complaint is determined by the pleadings alone. *Beaudrie v. Henderson,* 465 Mich. 124, 129, 631 N.W.2d 308 (2001). A motion under this subrule is appropriate only where "no factual development could possibly justify recovery." *Wade v. Dep't of Corrections,* 439 Mich. 158, 163, 483 N.W.2d 26 (1992).

*5 "A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence." *Maiden, supra* at 119, 597 N.W.2d 817. However, the contents of the complaint are accepted as true unless contradicted by documentation submitted by the moving party. *Id.; Patterson v. Kleiman,* 447 Mich. 429, 434 n. 6, 526 N.W.2d 879 (1994). Judgment under MCR 2.116(C)(7) is appropriate "[i]f the pleadings demonstrate that a party is entitled to judgment as a matter of law, or if affidavits or other documentary evidence show that there is no genuine issue of material fact." *Harris v. Allen Park,* 193 Mich.App. 103, 106, 483 N.W.2d 434 (1992). Absent a contested issue of fact, this Court decides whether a cause of action is barred by a statute of limitations de novo, as a question of law. *City of Novi v. Woodson,* 251 Mich.App. 614, 621, 651 N.W.2d 448 (2002). In addition, the interpretation of a statute is a question of law that we review de novo.

"A statute of repose prevents a cause of action from ever accruing when the injury is sustained after the designated statutory period has elapsed. A statute of limitation, however, prescribes the time limits in which a party may bring an

action that has already accrued." *Sills v. Oakland General Hosp.*, 220 Mich.App. 303, 308, 559 N.W.2d 348 (1996) (internal citation omitted). Courts have concluded that a single enactment can contain both a statute of limitation and a statute of repose. See *O'Brien v. Hazelet & Erdal*, 410 Mich. 1, 15, 299 N.W.2d 336 (1980); *Sills, supra* at 308, 559 N.W.2d 348. For instance, in *Sills, supra* at 307-308, 559 N.W.2d 348, the applicable statute for the plaintiff's medical malpractice action provided:

> Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. However, ... the claim shall not be commenced later than 6 years after the date of the act or omission that is the basis for the claim.... A medical malpractice action that is not commenced within the time prescribed by this subsection is barred. [MCL 600.5838a(2).]

The *Sills* Court held that the statute was both a statute of limitation and a statute of repose since "it prescribes the time limit in which a plaintiff who is injured within the statutory period must bring suit and also prevents a plaintiff from bringing suit if she sustained an injury outside the statutory period." *Id.* at 308, 559 N.W.2d 348.

i. MCL 451.810(a)(1)

[1] The first count of plaintiffs' complaint alleges that defendants failed to register securities in contravention of section 301 of the MUSA, MCL 451.701, which provides:

> It is unlawful for any person to offer or sell any security in this state unless 1 of the following is met:
>
> (1) It is registered under this act.
>
> *6 (2) The security or transaction is exempted under section 402.
>
> (3) The security is a federally covered security.

The statute provides, "A person may not bring an action under subsection (a)(1) more than 2 years after the contract of sale." MCL 451.810(e).

Plaintiffs filed their initial complaint on February 1, 2005. Plaintiffs invested in Agave over two years before they filed their complaint. Nevertheless, plaintiffs argued that this claim was tolled by Michigan's fraudulent concealment statute, MCL 600.5855.[4]

An Official Comment to a subsequent version of the federal Uniform Securities Act provides:

> The 1956 Act section 410(p) provided that: "No person may sue under this section more than two years after the contract of sale." Under this provision, the state courts generally decline to extend a statute of limitations period on grounds of fraudulent concealment or equitable tolling ... [Section 410(p) of] the 1956 Act, is a unitary statute of repose.... It is not intended that equitable tolling be permitted. [Uniform Laws Annotated, Uniform Securities Act of 2002, § 509, Official Comment # 14.]

In three federal cases arising out of the same securities transactions and concerning nearly identical factual and legal allegations, the plaintiffs brought claims against Hyman Lippitt, Givens and others, in part, under the MUSA based on the alleged unregistered sales of securities and the material misrepresentations and omissions in the sale of securities. *Adams v. Hyman Lippitt P.C.*, --- F Supp 2d ---- (ED Mich, 2005); 2005 WL 3556196, 16; see also *Burket v. Hyman Lippitt, P.C.*, --- F Supp 2d ---- (ED Mich, 2005); 2005 WL 3556202, and *Cliff v. Hyman Lippitt, P.C.*, --- F Supp 2d ---- (ED Mich, 2005); 2005 WL 3556201.[5] With regard to the application of this Official Comment to the MUSA claims, the federal district court noted that, "[a]lthough this Official Comment was included in a later version of the Uniform Securities Act, it specifically addresses the 1956 version of the Uniform Securities Act, which was the version adopted in Michigan." *Adams, supra* at 17. The language of section 410(p) is nearly identical to the limiting language in MCL 451.810(e) as it relates to actions under subsection (a)(1). Thus, the federal district court applied this comment to the MUSA claims, concluding that most were barred by the statute of repose. *Id.*[6] Likewise, this comment is applicable to plaintiffs' MUSA claims and leads us to conclude that MCL 451.810(e) contains a period of repose with regard to the claim under subsection (a)(1).

This Court has held that the fraudulent concealment statute will not operate to toll a statute of repose. *Baks v. Moroun,* 227 Mich.App. 472, 486, 576 N.W.2d 413 (1998), overruled in part on other grounds *Estes v. Idea Engineering & Fabricating, Inc.,* 250 Mich.App. 270, 649 N.W.2d 84 (2002). Accordingly, the trial court properly determined that plaintiffs' claim under MCL 451.810(a)(1) was barred by the two-year statute of repose.

ii. MCL 451.810(a)(2)

*7 [2] The second count of plaintiffs' complaint alleges that defendants sold securities by means of misrepresentation and omission in contravention of section 410 of the MUSA, MCL 451.810(a)(2). This statute provides:

> (a) Any person who does either of the following is liable to the person buying the security from him or her ...
>
> (2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he or she did not know, and in the exercise of reasonable care could not have known, of the untruth or omission. [MCL 451.810(a)(2).]

The statute also states, "A person may not bring an action under subsection (a)(2) more than 2 years after the person, in the exercise of reasonable care, knew or should have known of the untruth or omission, but in no event more than 4 years after the contract of sale." MCL 451.810(e). Plaintiffs again argued that this claim was tolled under Michigan's fraudulent concealment statute.

As in *Sills, supra,* the portion of MCL 451.810(e) pertaining to claims under subsection (a)(2) is both a statute of limitation and a statute of repose. The language precluding a party from bringing an action under subsection (a)(2) more than four years after the contract of sale is a statute of repose as it contains an express period for filing an action. See *Sills, supra* at 308, 559 N.W.2d 348. As we previously noted, the fraudulent concealment statute will not operate to toll a statute of repose. *Baks, supra* at 486, 576 N.W.2d 413. Thus, to the extent that plaintiffs' investments occurred more than four years before they filed their complaint, the trial court properly determined that the claim under MCL 451.810(a)(2) was time-barred. [7]

[3] However, the language precluding a party from bringing a cause of action more than two-years after the party knew or should have known about the untruth or omission is a statute of limitation as it prescribes a time limit during which an action that has already accrued may be filed. See *Sills, supra* at 308, 559 N.W.2d 348. Pursuant to Michigan law, a statute of limitations may be tolled where a defendant has fraudulently concealed a cause of action, MCL 600.5855, such as where a defendant's conduct conceals the existence of a claim from a plaintiff. *Eschenbacher v. Hier,* 363 Mich. 676, 682, 110 N.W.2d 731 (1961).

Plaintiffs asserted that, because of defendants' actions of concealment, they did not discover the facts of defendants' involvement until December 2004 when they became aware of the general power of attorney prepared and given to Kisor, which allowed him the opportunity to embezzle and misallocate Agave funds. We disagree, and instead hold that the SEC's press release, coupled with plaintiffs' preexisting knowledge of defendants' relationship to Agave and Kisor, demonstrate that plaintiffs knew or should have known of a possible cause of action against defendants in November 2002.

*8 Under Michigan law, "[f]or a plaintiff to be sufficiently apprised of a cause of action, a plaintiff need only be aware of a 'possible cause of action.' " *Doe v. Roman Catholic Archbishop of the Archdiocese of Detroit,* 264 Mich.App. 632, 643, 692 N.W.2d 398 (2004), quoting *Moll v. Abbott Laboratories,* 444 Mich. 1, 23-24, 506 N.W.2d 816 (1993). "[T]he plaintiff need not be able to prove each element of the cause of action before the statute of limitations begins to run." *Solowy v. Oakwood Hosp. Corp.,* 454 Mich. 214, 224, 561 N.W.2d 843 (1997). "Once a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim." *Id.* at 223, 561 N.W.2d 843.

This "possible cause of action" standard coincides with the "inquiry notice" standard the Sixth Circuit utilizes for securities fraud actions, which requires plaintiffs "to begin investigating the possibility of fraud when they bec[o]me aware of suspicious facts, or 'storm warnings.' " *Greenburg v. Hiner,* 359 F Supp 2d 675, 682 (N.D.Ohio, 2005), quoting *New England Health Care Employees Pension Fund v. Ernst*

& Young, LLP, 336 F.3d 495, 501 (C.A.6, 2003); see also *In re Livent, Inc., Securities Litigation*, 148 F Supp 2d 331, 364-365 (S.D.N.Y., 2001). "[I]nquiry notice is triggered by evidence of the possibility of fraud, not full exposition of the scam itself.... The plaintiff need only possess a low level of awareness; he need not fully learn of the alleged wrongdoing." *Greenburg, supra* at 682 (citations omitted). Otherwise stated, "The plaintiff need not have before him all the facts necessary to establish that a statement was untrue or omitted before the limitations period accrues. Once a plaintiff is in possession of facts sufficient to make him suspicious, or that ought to make him suspicious, he is deemed to be on inquiry notice." *Id*. at 682-683, quoting *Harner v. Prudential Securities, Inc.*, 785 F.Supp. 626, 633 (E.D.Mich., 1992).

In their complaint, plaintiffs asserted that they were entitled to damages because they had lost their investments made in Agave. Plaintiffs admittedly were not merely investors in Agave, but also were preexisting clients of Hyman Lippitt at the time of investment, or in the case of plaintiff Buchard, had personal contact with representatives of Hyman Lippitt before investing in Agave. Indeed, plaintiffs specifically alleged that, prior to any dealings with Hyman Lippitt over Agave, Hyman Lippitt engaged in estate planning and offshore asset protection, which included the formation of Seaspray and its financial structure. This establishes that plaintiffs knew that Hyman Lippitt had expertise in forming offshore investment ventures. After Hyman Lippitt established Seaspray for plaintiff Pukke, plaintiffs alleged that plaintiff Buchard and other Seaspray representatives traveled to Michigan for an investment meeting where Givens informed them that Hyman Lippitt represented Kisor, that it had done "due diligence" on Kisor, that Kisor's operation was legitimate, and that the returns on the investments in Agave were as represented. Plaintiffs asserted that they invested in Agave "[i]n reliance on these representations, [and] in the belief that Hyman Lippitt had properly, competently and ethically represented Agave *in its formation* and issuance of shares...." (Emphasis added.) These statements indicate that plaintiffs, who were already experienced with Hyman Lippitt's offshore practice, knew at the time they invested in Agave that Hyman Lippitt represented Agave and the individual responsible for the investment entity, that Hyman Lippitt formed Agave and that it issued shares in Agave.

*9 In November 2002, the SEC issued its press release. While the press release, including the SEC's complaint, did not refer directly to Givens or Hyman Lippitt, it contained allegations of fraud against Mohn and Kisor for their conduct relating to Agave. Specifically, the complaint alleged that Kisor misappropriated and misallocated investor funds, resulting in financial losses for investors.

Addressing a similar issue in the federal securities fraud cases, Judge Duggan concluded that the SEC's filing of its complaint and issuance of its press release in November 2002 should not have placed plaintiffs on inquiry notice of a possible cause of action against defendants. *Adams, supra* at 12. While the press release alone may have been insufficient to apprise plaintiffs of a possible cause of action against defendants, plaintiffs' prior dealings with defendants and knowledge of defendants' involvement with Agave demonstrate that they knew or should have known of a possible cause of action in November 2002. Here, unlike in *Adams*, plaintiffs were clients of Hyman Lippitt or had personal contact with representatives of Hyman Lippitt. Plaintiffs indicated that they knew Hyman Lippitt had experience in forming offshore investment ventures and had "represented Agave in its formation and issuance of shares." Plaintiffs asserted that they invested in Agave in reliance on information about Kisor and his operation that was furnished by Givens and Mohn. Based on this knowledge, the press release naming Mohn and Kisor as defendants in a fraud scheme regarding the sale of Agave shares ought to have minimally made plaintiffs suspicious and to have spurred their diligent investigation of defendants' involvement in the scheme.[8] As noted, "[t]he plaintiff need only possess a low level of awareness; he need not fully learn of the alleged wrongdoing." *Greenburg, supra* at 682 (citations omitted).

Furthermore, contrary to plaintiffs' argument, the surfacing of the power of attorney document in December 2004 did not provide initial notice, but rather provided further confirmation of defendants' possible wrongdoing. Given their prior knowledge, once plaintiffs learned of the allegations against Mohn and Kisor in the SEC's complaint, this claim began to accrue because they were aware of a possible cause of action against defendants. Therefore, we conclude that the trial court did not err in dismissing as a matter of law the remainder of plaintiffs' claim under MCL 451.810(a)(2).

B. Legal Malpractice Claim

Plaintiffs also assert that the trial court erred in dismissing their legal malpractice claim against defendants as untimely. The elements of a legal malpractice claim are: "(1) the existence of an attorney-client relationship; (2) negligence in

the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Manzo v. Petrella and Petrella & Assoc., P.C.*, 261 Mich.App. 705, 712, 683 N.W.2d 699 (2004), citing *Charles Reinhart Co. v. Winiemko*, 444 Mich. 579, 585-586, 513 N.W.2d 773 (1994). Plaintiffs alleged that defendants committed malpractice in the following manner:

> ***10** 54. Defendants Givens and Hyman Lippitt represented and held out to the public that they were equipped, qualified and prepared to represent Plaintiffs Pukke and Seaspray in matters relating to offshore investments generally, and specifically with respect to Agave.
>
> 55. At all times relevant hereto, Defendants had a duty to provide Plaintiffs with a qualified and competent attorneys and staff and to render competent advise, representation and assistance in accordance with the standards then prevailing in the community. Defendant and each of the attorneys providing services to Plaintiffs had the duty to possess that degree of learning and skill that is ordinarily possessed by attorneys practicing in the areas in which Hyman Lippitt represented that it practiced, including in particular the fields of international or offshore tax planning and investment and state, federal and international securities law.
>
> 56. Defendants, at variance with applicable community standards, were guilty of malpractice and negligence, in that Defendants, knowing that potential investors, including Hyman Lippitt clients such as Plaintiffs would rely upon them to have competently performed services in accordance with their own representations:
>
> (i) failed to perform any "due diligence" or background information on Kisor;
>
> (ii) prepared and authorized the dissemination of subscription documents, including those sent to Plaintiffs, which misrepresented and omitted material facts;
>
> (iii) supervised and administered a distribution of securities which violated both federal and Michigan law; and
>
> (iv) prepared and advised the use of a general power of attorney which gave Kisor the power to misappropriate and/or misallocate Agave funds; and
>
> (v) met with and personally assured Pukke and Buchard that Agave was a client of Hyman Lippitt and was an appropriate investment for Seaspray.
>
> 57. As alleged above, Hyman Lippitt fraudulently concealed the fact that the power of attorney which it had prepared and directed GNT to execute and forward to EDF Mann was fatally defective and had in fact permitted Kisor's embezzlement and misallocation of funds....

With regard to the timeliness of this claim, the statute of limitations for a legal malpractice claim has two different measurements. A claim must be filed within two years after the attorney "discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose." MCL 600.5805(6) and 600.5838(1). Alternatively, the claim must be filed within six months after the plaintiff "discovers or should have discovered the existence of the claim." MCL 600.5838(2).

[4] Plaintiffs filed their initial complaint on February 1, 2005. Plaintiffs assert that Givens left Hyman Lippitt in June 2002. Therefore, plaintiffs' complaint was filed more than two years after Givens ceased providing legal services to them.

[5] However, plaintiffs again assert that they did not discover the facts forming the basis of the legal malpractice claim until December 2004. In accordance with our previous holding, i.e., that the SEC's complaint and press release, when viewed in light of plaintiffs' prior dealings with defendants and knowledge of defendants' involvement with Agave, demonstrated that they knew or should have known of a possible cause of action against defendants in November 2002, we conclude that plaintiffs' legal malpractice claim was also untimely filed.

C. Fraud and Breach of Fiduciary Duty Claims

***11** **[6]** [7] Plaintiffs contend that their fraud and breach of fiduciary duty claims do not fail as being merely duplicative of their legal malpractice claim. Defendants argue otherwise, citing *Adkins v. Annapolis Hosp.*, 116 Mich.App. 558, 323 N.W.2d 482 (1982), *Barnard v. Dilley*, 134 Mich.App. 375, 350 N.W.2d 887 (1984), and *Aldred v. O'Hara-Bruce*, 184 Mich.App. 488, 458 N.W.2d 671 (1990). These cases do not stand for the proposition that claims arising out of an attorney-client relationship can only sound

in negligence. Rather, they provide that the applicable period of limitations depends on the theory actually pleaded where the same set of facts support either of two different causes of action. See *Adkins, supra* at 563, 323 N.W.2d 482; *Barnard, supra* at 378, 350 N.W.2d 887; *Aldred, supra* at 490, 458 N.W.2d 671.

Furthermore, this Court has held that "the interest involved in a claim for damages arising out of a fraudulent misrepresentation differs from the interest involved in a case alleging that a professional breached the applicable standard of care. Simply put, fraud is distinct from malpractice." *Brownell v. Garber,* 199 Mich.App. 519, 532, 503 N.W.2d 81 (1993). The elements of fraud are:

> "(1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery." [*Brownell, supra* at 533, 503 N.W.2d 81, quoting *Scott v. Harper Recreation, Inc.*, 192 Mich.App. 137, 144, 480 N.W.2d 270 (1991), reversed on other grounds 444 Mich. 441, 506 N.W.2d 857 (1993).]

"Silent fraud" exists when there has been a suppression of material facts and a duty to disclose those facts. *M & D, Inc. v. W.B. McConkey,* 231 Mich.App. 22, 35-36, 585 N.W.2d 33 (1998).

In accordance with the allegations of material misrepresentations and omissions plaintiffs asserted in the facts section of their complaint, they also allege:

> Givens was present when representations [were] made to representatives of [Seaspray], who had traveled to Michigan specifically to receive assurances from Mohn and Hyman Lippitt concerning Seaspray's proposed investment in Agave, that Agave was experiencing returns in excess of 2% per month. Givens failed to disclose that (i) Hyman Lippitt, contrary to written representations made to plaintiffs, had not done any due diligence on Kisor; and (ii) the represented returns were based solely upon information supplied [by] Kisor which was totally unverified.
>
> Hyman Lippitt failed to disclose that the power of attorney which it had prepared and which Givens had directed Puai Wichman to execute was defective and created a risk that Kisor could embezzle and/or misappropriate funds.
>
> *12 Hyman Lippitt also knowingly and deliberately failed to disclose material facts to Seaspray by failing to disclose that it could not independently advise Seaspray concerning the proposed investment in Agave because of the multiple conflicts of [interest] which arose from its simultaneous representation of Kisor, Agave, Mohn and Seaspray, and by failing to disclose how those conflicts of interest could adversely affect plaintiff's interests in the future.
>
> In purchasing Agave Shares, Seaspray relied on the misrepresentations of material fact alleged above, and would not have made such purchase had it known the true facts, including the facts which defendants failed to disclose.

Because plaintiffs' complaint states a claim for fraud, and because fraud can be alleged independent of a legal malpractice claim, the trial court improperly dismissed plaintiffs' claim of fraud as duplicative of the legal malpractice claim under MCR 2.116(C)(8).

Similarly, this Court has held that breach of fiduciary duty claims are not duplicative of legal malpractice claims:

> The conduct required to constitute a breach of fiduciary duty requires a more culpable state of mind than the negligence required for malpractice. Damages may be obtained for a breach of fiduciary duty when a position of influence has been acquired and abused, or when confidence has been reposed and betrayed. [*Prentis Family Foundation, Inc v. Barbara Ann Karmanos Cancer Inst,* 266 Mich.App. 39, 47, 698 N.W.2d 900 (2005) (citation omitted).]

Plaintiffs alleged that, because of the attorney-client relationship with Hyman Lippitt, the law firm owed a fiduciary duty. Plaintiffs further alleged that Hyman Lippitt breached that duty by making material misrepresentations and omissions, and "particularly by advising and directing the creation of Genesis for the benefit of U.S. Investors and

transferring all of Agave cash to Genesis." Thus, plaintiffs alleged a claim of breach of fiduciary duty. Accordingly, the trial court improperly dismissed plaintiffs' claim for breach of fiduciary duty as duplicative of the legal malpractice claim under MCR 2.116(C)(8).

D. Section 810(b)

[8] The first and second counts of plaintiffs' complaint allege claims against Givens and Hyman Lippitt under MCL 451.810(b). Under this section a person having one of the enumerated relationships with the seller of the securities may be held "liable jointly and severally with and to the same extent as the seller." *Id.* Defendants contend on cross-appeal that the actual seller of the securities must be a party to the action for plaintiffs to pursue claims based on section 810(b), relying on *Metal Tech Corp. v. Metal Teckniques Co., Inc.*, 74 Ore App 297, 305-306, 703 P.2d 237 (1985).[9] However, the holding in *Metal Tech Corp,* does not require the plaintiff to sue the actual seller. Rather, it merely requires the plaintiff to prove the liability of the seller. In *South Western Okalahoma Development Authority v. Sullivan Engine Works, Inc.*, 1996 OK 9, 910 P.2d 1052 (1996), on which the trial court relied in rejecting defendants' argument, the Oklahoma Supreme Court held that, under a similar statute, the plaintiff was not required to sue the seller. *Id.* at 1058. "The plaintiff need only prove that seller has committed the acts or omissions which may result in liability according to subsection (a).... As long as the requirements of [subsection b] ... are proven, a plaintiff may bring an action against the material participant only or against the seller as well." *Id.* Therefore, the trial court did not err in denying defendants' motion for summary disposition on this basis.

***13** **[9]** Also on cross-appeal, defendant Hyman Lippitt claims that it is not a member of a class that can be sued under section 810(b). Plaintiffs' complaint alleges:

> By virtue of § 451.810, Plaintiff is entitled to recover the entire consideration paid for the Agave Shares. Defendants Givens and Hyman Lippitt are liable for the aforesaid violations by virtue of Section 451.810(b), which provides that every person who directly or indirectly controls a seller [is] liable under Section 451.810, and every agent of the seller who materially aids in the sale, is also liable jointly and severally with the seller. Because Givens acted as alleged above within the course and scope of his employment with Hyman Lippitt, Givens and Hyman Lippitt were "control persons" of Agave. In addition, by acting as alleged above, Givens acted as an agent of the seller and materially aided in the sale of Agave Shares to Plaintiffs. Hyman Lippitt is vicariously liable for the acts and omissions to act of Givens, because Givens at all times acted, or failed to act, within the course and scope of his employment by Hyman Lippitt.

MCL 451.810(b) imposes liability on a "person" having one of the specified relationships with the seller of the securities. A person has been defined, in relevant part, as "an individual, a corporation, a partnership, [and] an association...." MCL 451.801(s). It is a well-established legal principle that a corporation may be liable for the acts of its employees committed within the course and scope of the employment. *Linebaugh v. Sheraton Michigan Corp.*, 198 Mich.App. 335, 343, 497 N.W.2d 585 (1993). Because a corporation acts through its employees, Hyman Lippitt could only be held liable for its involvement if Givens acted within the course and scope of his employment for the firm. Plaintiffs' complaint asserts that Givens did so. Therefore, we conclude that the complaint sufficiently alleges that Hyman Lippitt is liable as a controlling person under MCL 451.810(b). We further conclude that plaintiffs' reference to the common law theory of "vicarious liability" was in regard to the principal-agent relationship between Hyman Lippitt and Givens, which was necessary to prove Hyman Lippitt's liability. Plaintiffs were not using a common law theory to create a new class of persons against whom liability may be asserted as defendants suggest. In sum, the trial court did not err in denying defendants' motion for summary disposition on the basis of this argument.

E. Judicial Disqualification

[10] Plaintiffs contend that the trial judge should have been disqualified. When reviewing a motion to disqualify a judge,

we review the trial court's factual findings for an abuse of discretion, but review de novo the applicability of the facts to the relevant law. *Gates v. Gates,* 256 Mich.App. 420, 439, 664 N.W.2d 231 (2003). Following the judge's disclosure that J. Leonard Hyman had represented her father's business at one time, plaintiffs filed a motion to disqualify Judge Tyner pursuant to MCR 2.003. Ruling from the bench, the trial judge denied the motion, finding that:

> *14 There's absolutely no reason for me not to hear this case. I certainly was surprised, at the very least, to see that the Hyman Lippitt firm represented Hartman and Tyner as long ago as of '92 I believe it is. Anyway, enough said on this matter.

A party seeking disqualification of a judge based on bias or prejudice bears the burden of proof and must overcome a strong presumption of judicial impartiality. MCR 2.003(B); *Cain v. Dep't of Corrections,* 451 Mich. 470, 497, 548 N.W.2d 210 (1996). Absent proof of actual personal bias or prejudice, a judge will not normally be disqualified. *Schellenberg v. Rochester Lodge No. 2225 of the Benevolent & Protective Order of Elks,* 228 Mich.App. 20, 39, 577 N.W.2d 163 (1998). Generally, such a showing requires that the bias be both personal and extrajudicial, in other words "the challenged bias must have its origin in events or sources of information gleaned outside the judicial proceeding." *Cain, supra* at 495-496, 548 N.W.2d 210. Moreover, judicial disqualification based on due process is "not easily met" and, absent a showing of actual bias, is justified only where " 'experience teaches that the probability of actual bias ... is too high to be constitutionally tolerable." ' *Id.* at 514, 548 N.W.2d 210, quoting *Crampton v. Dep't of State,* 395 Mich. 347, 351, 235 N.W.2d 352 (1975).

In this case, plaintiffs based their allegation of bias on the prior business relationship that the trial judge's father had with Hyman. There was evidence that a prior business relationship existed; however, there was also evidence that the relationship occurred several years before and that Hyman was not involved in any of the allegedly fraudulent transactions at issue in this case.[10] Plaintiffs have pointed to no conduct by Judge Tyner that demonstrates prejudice or bias, other than that Judge Tyner ruled against them on disputed matters. Rulings against a party, even if erroneous, do not constitute bias or prejudice and are not grounds for disqualification. *Armstrong v. Ypsilanti Twp.,* 248 Mich.App. 573, 597-598, 640 N.W.2d 321 (2001). Additionally, there is no record evidence for believing that Judge Tyner displayed "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Cain, supra* at 496, 548 N.W.2d 210 (citation omitted). Even plaintiffs' assertions that Judge Tyner failed to enter an order denying their motion and to seek referral to the Chief Judge do not demonstrate bias. Apparently, plaintiffs initially failed to present an order to the court, and Judge Tyner eventually entered a written order in accordance with her prior decision on the matter. Furthermore, "[i]n a court having two or more judges, *on the request of a party,* the challenged judge shall refer the motion to the chief judge, who shall decide the motion de novo." MCR 2.003(C)(3) (emphasis added). Plaintiffs did not make such a request until August 17, 2005, after which Chief Judge Potts heard the matter and determined that there was no need for disqualification. Based on the record, plaintiffs failed to show actual and personal bias or anything close to satisfying the constitutional standard. Therefore, the trial judge should not have been disqualified.

*15 Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

Footnotes

1 In its response brief on appeal, Hyman Lippitt raises a jurisdictional challenge. Hyman Lippitt contends that plaintiffs' appeal is untimely because plaintiffs failed to file their postjudgment motion within 14 days of the final order pursuant to MCR 2.119(F)(1). Although that court rule provides that a motion for reconsideration must be filed within 14 days of the entry of the order being challenged, the appellate court rules allow a party to appeal so long as the motion was filed within 21 days of the order being appealed. MCR 7.204(A)(1)(b). Here, the trial court entered an order granting summary disposition in favor of defendants on August 9, 2005, and plaintiffs filed a motion for relief from judgment on August 29, 2005. Because plaintiffs filed their postjudgment motion within the requisite 21 days, Hyman Lippitt's jurisdictional challenge lacks merit.

2 In a motion for summary disposition under MCR 2.116(C)(8), this Court must accept all factual allegations in the complaint as true. *Maiden v. Rozwood,* 461 Mich. 109, 119, 597 N.W.2d 817 (1999); *Alan Custom Homes, Inc. v. Krol,* 256 Mich.App. 505, 508, 667 N.W.2d 379 (2003). Moreover, the contents of the complaints are accepted as true unless contradicted by documentation submitted

by the moving party in a motion for summary disposition under MCR 2.116(C)(7). *Maiden, supra* at 119, 597 N.W.2d 817; *Patterson v. Kleiman,* 447 Mich. 429, 434 n. 6, 526 N.W.2d 879 (1994).

3 Apparently, at a hearing on June 15, 2005, the trial court mentioned that J. Leonard Hyman of Hyman Lippitt had represented her father's business and inquired regarding the extent of Hyman's participation in this matter. Subsequently, both parties filed briefs regarding this issue and its relevance to judicial disqualification. Hyman Lippitt submitted Hyman's Affidavit, in which he averred that he was not personally involved nor connected in any way with this matter or any related matter. Thereafter, plaintiffs filed a motion to disqualify the trial judge.

4 MCL 600.5855 provides: "If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations."

5 These three cases were again before the federal district court on defendants' motion for clarification or reconsideration; however, the subsequent holdings do not affect the rulings on which we rely. See *Adams v. Hyman Lippitt, P.C.,* --- F Supp 2d ---- (ED Mich, 2006); 2006 WL 901703; *Burket v. Hyman Lippitt, P.C.,* --- F Supp 2d ---- (ED Mich, 2006); 2006 WL 901696; *Cliff v. Hyman Lippitt, P.C.,* --- F Supp 2d ---- (ED Mich, 2006); 2006 WL 901665.

6 Although nonbinding on this Court, decisions from other jurisdictions can be persuasive. *Abela v. General Motors Corp.,* 469 Mich. 603, 607, 677 N.W.2d 325 (2004).

7 Apparently, this four-year period of repose only bars the first of plaintiff Seaspray's investments because the complaint was initially filed on February 1, 2005, and according to the complaint, plaintiff Seaspray made the following investments in Agave:

October 1, 2000	$2,055,302
February 2, 2001	$199,181
March 30, 2001	$149,615
April 1, 2001	$87,000
July 20, 2001	$87,000
August 2, 2001	$435,000
November 1, 2001	$87,000
November 30, 2001	$217,000
December 31, 2001	$397,500
March 30, 2002	$130,500
April 23, 2002	$217,500

Plaintiff Buchard invested the following in Agave:

February 1, 2001	$199,181
March 30, 2001	$189,450
[April] 1, 2001	$29,919
June 27, 2001	$75,722
July 21, 2001	$2,728
October 8, 2001	$148,837

8 Apparently, further investigation would have revealed references to Givens and Hyman Lippitt in the transcripts of Mohn's testimony attached to the Barrett Declaration that was referenced in the SEC's complaint.

9 We note that defendants did not claim that they were not material participants in the sale of Agave shares.

10 Although Hyman claims that he has no knowledge concerning this case, his signature appears on Hyman Lippitt's motion for summary disposition. Nevertheless, there is no record evidence that Hyman argued the motion or appeared before the trial judge in this matter.

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